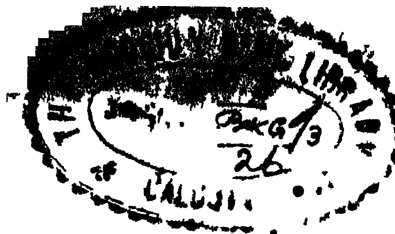


DEBENTURES

DEBENTURES

A HANDBOOK FOR LIMITED COMPANY OFFICIALS, INVESTORS AND BUSINESS MEN

BY

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PREFACE

THE object of this book is to provide, in a handy form, such information on the subject of "Debentures" as should be sufficient for the requirements of the ordinary business man, or of the average member of the investing public. While it is scarcely possible to deal with the subject in a manner likely to be useful without constant mention of the law, yet it must not be supposed that any exhaustive legal treatment of the topic is here attempted. For that, larger works must be consulted. A little learning is, doubtless, a dangerous thing, but it is often better than none at all. It is hoped that the following pages may prove useful to those who, from time to time, desire some guidance as to their position in respect of a phase of commercial life which is of ever growing interest to the business community.

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DEBENTURES

CHAPTER I

INTRODUCTORY

The Meaning of "Debenture."

THE word "debenture," although not a new word, has at the present day a signification of modern growth. In connection with limited companies it is in such frequent use, that it may occasion surprise to some to find that, in the Companies Act, 1862, the charter of modern co-operative enterprise, the word did not occur at all. In the statutes relating to companies, the first mention of the word "debentures" was in the Directors' Liability Act, 1890, and the next in the Preferential Payments in Bankruptcy Amendment Act, 1897. The word also occurs, in its present day sense, in the Stamp Act, 1870, the Stamp Act, 1891, and in the Bills of Sale Amendment Act, 1882. In the Companies Act, 1900, and in later company statutes it is of comparatively frequent occurrence. The truth seems to be that the debenture, as we understand it, was a document brought into being by the exigencies of business as carried on by incorporated companies, which the legislature was at length compelled to recognize.

What is a debenture? The legal definitions, or attempted definitions, of the term are unsatisfactory. In *Levy* v. *Abercorris Slate Company* (1887, 37 Ch.D., at p. 264), Chitty, J., said: "In my opinion a debenture means a document which either creates

a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture. I cannot find any precise legal definition of the term; it is not either in law or commerce a strictly technical term, or what is called a term of art." Etymologically debenture is simply *debentur*: they are due; or, there are due; and centuries ago the word was used as indicating a written acknowledgment of indebtedness, often by the Crown. But the definition formulated by Chitty, J., is far too wide for present day requirements. An I.O.U., which is within the definition, is certainly not a debenture. Other judicial gropings after the truth in the form of a definition are equally unconvincing (see *British India Steam Navigation Company* v. *Inland Revenue Commissioners*, 1881, 7 Q.B.D. 165; *Edmonds* v. *Blaina Furnaces Company*, 1887, 36 Ch.D. 215). In 1892, Bowen, L.J., said: "It seems that there are three usual forms of debentures. . . . The first is a simple acknowledgment, under seal, of the debt; the second, an instrument acknowledging the debt and charging the property of the company with repayment; and the third, an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any prior charge" (*English and Scottish Mercantile Company* v. *Brunton*, 1892, 2 Q.B. 700). This seems to be accurate, though it is not a definition, and it seems simpler to recognize that the term is a business term admitting of no precise definition, although what we ordinarily speak of as a debenture may be readily described. Speaking quite broadly, a debenture may be said to be a document under the seal of a company, binding the company to pay a certain sum of money, with interest thereon at a specified rate until payment, and giving

a charge upon property of the company to secure these payments.

The Commercial Importance of Debentures.

Commercially it would be difficult to over-estimate the importance of debentures. So vast are the sums borrowed by companies on the security of debentures, that few persons connected with companies can fail to be interested in the subject. Debenture capital, as this money is commonly called, plays as important a part in the success of a trading company as share capital. There are several reasons why the method of raising capital by borrowing on security is resorted to by companies. One reason is that it may not be easy, when capital is required, to find persons willing to risk their money in the concern, on the terms of their becoming co-adventurers, that is to say, shareholders. It is easier to find persons who are content to lend money to the company at a fixed rate of interest, provided that they are given adequate security. Another reason is that, where large profits are anticipated, shareholders are unwilling to increase the share capital, and thus admit others to participate in their prospective gains. In these circumstances it is considered more advantageous to borrow the money required at a much lower rate per cent. than is expected to be paid as dividends; whilst the lenders are content with a modest but well secured investment. A third reason is that the additional necessary capital may only be required for a limited time, at the expiration of which the company expects to be able to repay it. If this additional capital is raised by issuing fresh shares, such a company may find itself after a few years in the undesirable position of being over-capitalized, from which it can only escape

by petition to the Court for a reduction of capital, to be brought about by returning to the shareholders the unwanted capital. By borrowing on debentures, the burden of the additional capital, as well as the burden of the interest, need not be permanent.

The Advantages of Debentures.

Whatever the particular reason may be for borrowing on debentures, the advantages to a company of being able to do so are enormous. The debenture is the outcome of the necessities of a trading company. A series of judicial decisions has had the effect of legalizing the whole system in its present form, and the effect of these is that in borrowing money, a company is in most cases far better off than an individual trader, or than a firm. Incidentally it is to be observed that there is no legal reason why an individual or firm should not issue debentures, and there are cases where this has been done. Unincorporated clubs not infrequently issue them. But, apart from the issue of debentures by individuals and clubs, which from a business point of view may be disregarded, a company may be, if the particular circumstances of the case allow it, in a far more favourable position as regards raising loans than the individual trader.

If an individual trader desires to borrow, security being of course required, in the ordinary course he might either give a mortgage on his business premises, or on his own house, or a bill of sale over his business chattels or his own furniture, or he might deposit title-deeds, or share certificates, or life policies, with the lender. But, having done so, he might find himself seriously hampered in his affairs, or embarrassed in his business, through inability to deal

with the property he has charged. For example, he might be unable to get rid of his obsolete plant and purchase new, without the consent of the lender and without a great deal of irksome and expensive formality.

A company, on the other hand, if it has a good going business and adequate security, can by means of a debenture, or debentures, give a floating charge on its undertaking and carry on business as before without inconvenience or hindrance, whilst the lender, on his part, is amply protected. A company can, of course, create a mortgage, *i.e.*, a fixed charge on its property, just as an individual can; but it is the doctrine of the floating charge which is of such importance to companies, underlying as it does the history of the development of debentures in the commercial world.

The Floating Charge.

It was in 1870, by the decision in *Panama, New Zealand and Australian Royal Mail Company* (5 Ch. App. 318), that the validity and efficacy of a floating charge were first established. The facts of that case were as follows: The company, having power to borrow on mortgage of all or any of its property, or upon bonds or debentures, or other security, borrowed money in 1866 on debentures, which were of £100 each. The debentures, which were in a form now obsolete, began thus: "By virtue of the powers contained in our articles of association we, the Panama, New Zealand and Australian Royal Mail Company, Limited, in consideration of the sum of £100 paid to us by etc., are held and firmly bound, and do hereby for ourselves, our successors and assigns, charge the said undertaking and all the sums of money arising

therefrom, and all the estate, right, title, and interest of the company therein, with the payment to the said, etc., of the said sum of £100, together with interest for the same at the rate of £6 per cent. by the year," the interest being payable half-yearly. The company possessed fifteen steamships, as well as sailing ships and coal ships, and also valuable subsidies. Before the principal moneys became due, at a time when all interest had been duly paid, a winding-up order was made. The ships were sold, and the debenture holders claimed to have a charge on the proceeds in priority to the ordinary creditors, and Giffard, L.J., held that they were entitled to it. He held that the effect of the undertaking being charged was to charge the property, present and future, and not merely the income, and it followed that the company could carry on its business in the ordinary way until the charge attached, and that, the charge having attached by reason of the winding-up, the ordinary creditors could touch nothing until the debenture holders were paid. This decision gave judicial sanction to a system which met the requirements and desires of the business community, and the development of the debenture rapidly continued.

The Development of Debentures.

Amongst the points, now notorious features of debenture issues, which from time to time were accorded judicial recognition, may be mentioned the following, as materially assisting to place debentures on their present footing: that a whole series of debentures may be made to rank *pari passu* as regards security; that the Court can, at the instance of debenture holders, appoint a receiver, and, if necessary, a manager also; that a majority of debenture holders

may be empowered to bind the minority; that debentures to bearer are negotiable instruments; that registered debentures can be made transferable free from equities; and that debentures are outside the operation of the Bills of Sale Acts. The recognition of these and other points has contributed to the growth of the existing system of borrowing by companies upon security, a system alike beneficial to the companies themselves and to the investing public.

It will have been gathered from what has been said above that the bulk of the law relating to debentures is case law, and that such statute law as there is on the subject is of comparatively recent origin. Apart from the system of registration of debentures, which is the creation of statute, it is hardly too much to say that the legislation relating to debentures is scrappy. Sundry provisions, from time to time deemed necessary by Parliament, have been enacted with the object of regulating in certain particulars a system already well established. The bulk of case law, on the other hand, is enormous, and increasing, and likely to increase, every year. Few but the lawyer, however, can be interested in many of these decisions.

The Position of a Debenture Holder.

As regards the position of a debenture holder in a company, inasmuch as some misapprehension in this regard is by no means uncommon amongst the public, it may be as well to point out that a debenture holder, as such, is not a shareholder in the company in which he holds debentures. He is a creditor, and, in the vast majority of cases, a secured creditor. He has lent money to the company upon certain conditions as to security and otherwise and his rights are

regulated by those conditions. As a secured creditor, his rights prevail over those of the unsecured, or ordinary, creditor, apart from certain statutory provisions as to preferential creditors and some other matters which will be noticed in their place. It sometimes happens that a debenture holder complains that he has not received the annual report of the directors. But he is not a shareholder, and his only right in this respect is a statutory right, which he has under section 114 of the Companies (Consolidation) Act, 1908 (see p. 110). This section entitles him, in the case of a public company registered on or after 1st July, 1908, but in no other case, to receive the annual report, balance sheet, etc., if the ordinary shareholders of the company (as is generally the case) are entitled to receive them. The rights of the ordinary shareholders depend, of course, on the articles of association of the company. But the debenture holder, whilst he has not the privileges of a shareholder, and is not even entitled to attend meetings of the company, is, on the other hand, provided his security is adequate, not directly interested in the fortunes of the company, except in so far as they may affect the market value of his debentures. These features of the debenture holder's position are not always clearly recognized.

CHAPTER II

THE DIFFERENT KINDS OF DEBENTURES

Debentures and Debenture Stock.

THE word "debenture," as we have seen, denotes a document of a particular kind under the seal of a company. The term "debenture stock," on the other hand, does not denote a document of any kind. Debenture stock means the debt itself. "Debenture stock," said Lord Lindley, "is merely borrowed capital consolidated into one mass for the sake of convenience" (*Lindley on Companies*, 6th Edn., p. 346) Similarly, in In re *Bodman* (1891, 3 Ch. 135), Chitty, J., thus describes it: "Debenture stock is borrowed money capitalized for purposes of convenience."

The common collocation of words "debentures and debenture stock," is therefore technically inaccurate, although it could hardly be misleading to any one. It is also noticeable that in section 285, the interpretation section of the Companies (Consolidation) Act, 1908, (see p. 118), it is laid down that in the Act, unless the context otherwise requires, "debenture" includes debenture stock. Debentures and debenture stock, then, are not strictly comparable. A debenture might be compared, or contrasted, with a debenture stock certificate, and a debenture holder might be compared, or contrasted, with a debenture stock holder. But any attempted classification, on the footing of debentures on the one hand and debenture stock on the other, would be illusory.

Recognizing, then, that "debenture stock" is a

term apart, any classification of debentures will not include it.

Classification of Debentures.

There are several points of view from which debentures may be classified, and the chief of these are set out below.

A. Debentures may be either registered debentures, or debentures not registered.

I. Registered debentures may be—

(*a*) Simple registered debentures.

(*b*) Registered debentures, but with interest coupons to bearer.

II. Debentures not registered may be—

(*a*) Simple bearer debentures.

(*b*) Bearer debentures, but capable of registration.

B. Debentures may either contain a charge or not.

I. Debentures containing a charge, or secured debentures. The nature of the charge may vary. There may be—

(*a*) A fixed charge.

(*b*) A floating charge.

(*c*) Both a fixed and a floating charge.

II. Debentures not containing a charge, or unsecured debentures. These are often called naked debentures and are not secured by any charge.

C. The security, or charge, may be created by different documents. It may be—

I. A charge in the debentures themselves.

II. A charge in a trust deed securing the debentures.

III. A charge both in the debentures themselves and in a trust deed securing them.

D. The time for payment of the principal money may be provided for in various ways. Thus, it may be repayable—

I. At a specified date.
II. On specified notice.
III. Periodically by drawings
IV. Not at all, in which case the debentures are called perpetual or irredeemable debentures.

Registered Debentures.

The commonest type of debenture is a simple registered debenture, containing in the instrument itself a floating charge on the undertaking of the company, and providing for the repayment of the principal money on a fixed date.

A registered debenture is a debenture providing that the principal money due thereunder is to be paid to the registered holder of the debenture. The conditions of such a debenture provide that the company will keep a register, in which the names, addresses, etc., of the holders will be entered, with particulars of the debentures held by them respectively. A registered debenture generally provides also for the payment to the registered holder of the interest periodically due; but in some cases interest coupons, payable to bearer, are attached to the debenture, and the actual holder of these can at the proper times convert them into cash.

Bearer Debentures.

A debenture, which is not a registered debenture, provides for the payment of both principal and interest to the bearer, that is to say, the actual

holder of the debenture. To such a debenture interest coupons are attached, also payable to bearer. These debentures are commonly called bearer debentures. Sometimes they contain a condition entitling the holder, on request to the company, to be registered as the holder, in which case the debenture is produced to the company and a note of the registration indorsed on it. The holder is also generally entitled, on request, to have the registration cancelled, in which case the debenture again becomes a bearer debenture.

Their Negotiability.

The outstanding feature of a debenture to bearer is that it is, like a bill of exchange, a negotiable instrument. Whether it is secured by a charge in the debenture itself, or by a trust deed, or by both, or whether it is unsecured, nevertheless, provided that it contains nothing inconsistent with the quality of negotiability, it is negotiable, and transferable by mere delivery. An instrument may be described as negotiable when the legal right to the property secured by it is transferable from one to another by its delivery. The negotiability of bearer debentures has been established by judicial decisions.

The negotiability of various instruments has its origin in mercantile custom, which the Courts from time to time adopted as being in accordance with the usages of trade. "The law merchant . . . with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of Law, which upon such usages being proved before them have

adopted them as settled law with a view to the interests of trade and the public convenience.... By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law and may thus be said to form part of it." (*Per* Cockburn, C. J., *Goodwin* v. *Robarts*, L.R., 10 Ex. 337, at p. 346.) In *Bechuanaland Exploration Company* v. *London Trading Bank* (1898, 2 Q.B. 698), Kennedy, J., having heard evidence that debentures to bearer had for many years been treated in mercantile practice as negotiable instruments, transferable by delivery from hand to hand, held that the custom had been effectively proved, and that certain debentures to bearer issued by the Beira Junction Railway Company, an English company, were negotiable. And in 1902 Lord Mersey (then Bigham, J.), in *Edelstein* v. *Schuler & Co.* (1902, 2 K.B. 144), held that certain debentures to bearer, capable of registration, were negotiable instruments. He entirely agreed with the conclusions of Kennedy, J., in the *Bechuanaland Case*, and with the reasons which led up to them. He went on to express the considered opinion that it was no longer necessary for evidence to be given in support of the fact that such debentures are negotiable, and that the Courts ought to take judicial notice of it. The negotiability of bearer debentures is thus firmly established as part of the law of the land. It is important to remember that, being a negotiable instrument, a bearer debenture will pass on delivery free from all equities between the company and the original or any intermediate holder, and the delivery by the holder to the company of the debenture or of the interest coupons will be a good discharge to the company for the principal or interest as the case may be.

Unsecured Debentures.

As regards secured debentures, the nature of the charge whereby the security is conferred, and the documents whereby the charge is created, are dealt with later (see p. 40 *et seqq.*). Unsecured debentures, that is to say debentures which contain no charge, are at present an unusual class of document. As has been already stated, they are often called naked debentures. An unsecured debenture is simply a promise under the seal of the company to pay to the holder a certain sum with interest. The holder is merely an unsecured creditor of the company, and he cannot prevent the company, unless it is so provided by the conditions of the debenture, from issuing mortgage debentures which will rank before him. In one way only is his position better than that of an ordinary trade creditor. The debenture being under the seal of the company, the debt to him is a specialty debt, and not a simple contract debt, and consequently his right of action is not barred until the lapse of twenty, instead of six, years. He may bring an action against the company for his principal, when due, or for his interest, or both, and, having obtained a judgment, he can, if necessary, issue execution upon it. Or he may present a petition for winding up the company, either before or after he has obtained judgment. If a winding-up be in progress, he may prove for the debt as an ordinary unsecured creditor. But he has none of the remedies of the mortgagee, which are of such value to the holder of secured debentures (see Chapter VIII).

Perpetual Debentures.

Perpetual, or irredeemable, debentures, are debentures which are either stated to be irredeemable,

or which contain a provision that the principal moneys shall be repayable only on the happening of some event, however unlikely. Viewed in this light it will be seen that the transaction is not a loan transaction at all; it is a sale, for a given sum, of the right to a perpetual annuity (*Southern Brazilian Rio Grande Company*, 1905, 2 Ch. 78). There appears to be some doubt as to whether a debenture, which, whilst fixing no time for repayment, provides that it is redeemable at the option of the company, is really a perpetual debenture or not (see *Jarrah Timber Company* v. *Samuel*, 1903, 2 Ch. 1; *City of London Brewery Company* v. *Inland Revenue Commissioners*, 1899, 1 Q.B. 121).

The legality of perpetual debentures was formerly frequently called in question, as infringing the rule against perpetuities, or as offending against the equitable doctrine that there must be no clog on the equity of redemption. The legislature, however, intervened to legalize them, and now, by section 103 of the Companies (Consolidation) Act, 1908, it is provided that "A condition contained in any debenture or in any deed for securing debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding."

Issue of Debentures at a Discount.

Provided that the memorandum or articles of association of a company contain nothing to prevent it, debentures of any kind may be issued at a discount (*Campbell's Case*, 1876, 4 Ch. D. 470). Shares may not be issued at a discount, although by section 89 of

the Companies (Consolidation) Act, 1908, commissions may be paid on their issue, subject to certain restrictions. That section, however, has no application to debentures, and there is nothing whatever, subject to the constitution of the company not prohibiting it, to prevent a company obtaining loans on the best terms, as to commissions or discounts, that it can secure.

Commission paid on the issue of debentures must be paid in cash, or in the form of bonus debentures. Fully or partly paid up shares cannot be issued as commission for taking up debentures. Further, where debentures issued at a discount are exchangeable for fully paid shares, this involves the issue of shares at a discount and will be restrained (*Moseley* v. *Koffyfontein Mines*, 1904, 2 Ch. 108).

There are certain statutory provisions as to commissions or discounts paid or allowed on debentures, necessitating their adequate disclosure. Such commissions, etc., must be disclosed—

(*a*) In the company's annual summary (Sec. 26; see p. 90).

(*b*) In any prospectus of the company (Sec. 81 (1) (*h*); see p. 95).

(*c*) In a statement in lieu of prospectus (Sec. 82 and Second Schedule; see p. 97.)

(*d*) In every balance sheet until the whole amount has been written off (Sec. 90; see p. 101).

(*e*) In the particulars of mortgages and charges required to be registered with the Registrar of Companies (Sec. 93 (4); see p. 103).

CHAPTER III

BORROWING POWERS

A COMPANY which desires to borrow money on the security of debentures must first be satisfied that the proposed transaction is not beyond its powers. It is an essential feature of an incorporated company that it can do nothing but what it is authorized to do. Its powers are limited and defined by its memorandum of association, just as in the case of a statutory company its powers are limited and defined by its special Act. "I only repeat," said Lord Selborne in *Ashbury Carriage Company* v. *Riche* (1875, 7 H.L. at pp. 393, 394), "what Lord Cranworth stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is under that Act their fundamental, and (except in certain specified cases) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute, which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated, if a contract under the common seal, which on the face of it transgresses the fundamental law, were not

held to be void, and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators. . . . I am unable to see any distinction for this purpose between statutory corporations under Railway Acts, and statutory corporations under the Joint Stock Companies Act of 1862."

Express Power to Borrow.

The first question, then, for a company desirous of borrowing on debentures is to ascertain whether it has power to borrow. A modern company almost invariably has in its memorandum express power to borrow and to give security, in which case no difficulty arises. A form, something to the following effect, will in general be found in the objects clause (clause 3) of the memorandum: "To borrow, or raise, or secure the payment of money in such manner as the company shall think fit, and in particular by the issue of debentures or debenture stock perpetual or otherwise charged upon all or any of the company's property (both present and future) including its uncalled capital, and to purchase, redeem or pay off any such securities."

Implied Power to Borrow.

But sometimes, in the case of older companies, there is no express power to borrow, or only an imperfect one. In such a case the principle to be applied is this: if the power to borrow can be implied as incidental to the company's expressed objects, the company may borrow and may give security, in spite of the absence of an express power. In the case of a trading, or commercial company, it is settled law that it has implied power to borrow money for the purposes of its business, if such borrowing is not

expressly prohibited (*General Auction Estate Company* v. *Smith*, 1891, 3 Ch. 432; In re *Badger*, 1905, 1 Ch. 568), since borrowing is reasonably incidental to the objects for which it was established. On the other hand, a company which is not a commercial or trading company has no implied power to borrow (In re *Badger*). It is also settled law that, if a company has power to borrow, whether express or implied, it has power to give security, by way of mortgage or charge, for the loan (*General Auction Estate Company* v. *Smith*).

In the case of a company which is not a trading company not having an express power to borrow, or having an express power to borrow which is not sufficiently wide, the remedy is to be found in section 9 of the Companies (Consolidation) Act, 1908 (see p. 88), whereby the company can, by petition to the Court, obtain its sanction to certain classes of alterations in the objects clause of the company's memorandum of association. One class of alteration within the section is an alteration which will enable the company "to carry on its business more economically or more efficiently," and the inclusion of a power to borrow has frequently been sanctioned under this provision.

The Power to Borrow: How Exercised.

Assuming the existence of the power to borrow, whether express or implied, the method of its exercise, as prescribed by the articles, must be carefully followed. It is sometimes the case that the articles are entirely silent on the point, and contain no direct reference either to the borrowing powers of the company or to their exercise. There is, however, almost always an article specifying the powers of the

directors. Clause 71 of Table A, for example, is as follows: "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made." Where such an article exists, then, in the absence of any provision in the articles as to the borrowing powers of the company, the power to borrow is one of the powers of the company which is exercisable by the directors at their sole discretion and without limitations, and, provided that in borrowing they act *bona fide* in the interests of the company, their acts cannot be called in question.

More frequently, however, the articles of a company contain an express provision that the directors may exercise the borrowing powers of the company. Sometimes the power is given without any control from a general meeting of the company, whilst sometimes it is subject to the sanction of the company in general meeting. In the latter case it can only be exercised after the passing by a general meeting of an ordinary resolution authorizing it. Occasionally, however, the sanction of a special or extraordinary

resolution of the company is required. There is one practical difference in the effect, according as the sanction of an ordinary resolution on the one hand, or that of a special or an extraordinary resolution on the other hand, is required. An outsider dealing with the company, in accordance with the principle of the well known case of *Royal British Bank* v. *Turquand* (1855, 6 E. & B. 327), is entitled to assume that all the internal regulations of the company have been complied with. Thus, if he is lending money to the company, although he is in law taken to be acquainted with the contents of the memorandum and articles (which, being on the file at Somerset House, are public documents), and therefore to know, for example, that an ordinary resolution of the company is required before the directors can properly borrow, he is entitled to assume that the ordinary resolution has been duly passed. But, in the case of a special or extraordinary resolution being required, since by section 70 of the Companies (Consolidation) Act, 1908, copies of all such resolutions are required to be filed with the Registrar of Companies, it appears that the lender is not entitled to assume that such a resolution has been passed, since he may ascertain the fact for himself by inspection of the file (*Irvine* v. *Union Bank of Australia*, 1877, 2 A.C. at p. 379).

Limitations on Amount Borrowed.

A limit to the amount which may be borrowed is frequently provided for in articles of association. The limit is often absolute, and a sum, *e.g.*, £20,000, is named as the amount which may be outstanding on loans at any one time. Sometimes the limit is fixed with reference to the capital of the company; thus, for example, the amount outstanding may not

exceed the nominal amount of the company's capital, or the amount of the issued capital, or one half of the amount of the issued capital, or as the case may be. Or there may be a conditional limit, the articles providing that the amount outstanding may not exceed a certain sum, without the sanction of a resolution (or of an extraordinary, or a special resolution) of the company. It has been held by the Court of Appeal that, where by the articles the amount borrowed may not exceed the amount of the preference share capital, and no preference shares have in fact been issued, the restriction on borrowing does not apply until preference share capital is issued (In re *Johnson Foreign Patents*, 1904, 2 Ch. 234). In ascertaining whether in any particular case the limit prescribed has been exceeded, it must be remembered that an overdraft from a bank is a loan, and represents an exercise of a company's borrowing powers to the extent of the overdraft (*Cunliffe Brookes & Co.* v. *Blackburn Benefit Society*, 1885, 9 A.C. 857). Inasmuch as the amount of an overdraft is generally liable to constant fluctuations, it is necessary for a company which, having nearly reached the limit of its borrowing powers, desires to borrow further, to estimate as nearly as possible the probable maximum amount of the overdraft, and to take care not to exceed it, at the same time limiting the amount of its new borrowing to such an amount as, together with the estimated maximum overdraft and all other outstanding loans, will not exceed the limit of its borrowing powers.

It must not be forgotten that any provisions in the articles of a company as to borrowing, are, in common with all other provisions in articles of association, alterable by special resolution of the

company, in pursuance of section 13 of the Companies (Consolidation) Act, 1908.

The regulations of the Stock Exchange (see Appendix B, p. 128), require that companies applying for an official quotation shall have in their articles a provision limiting the borrowing powers of the board. Accordingly, in the case of companies having an official quotation, some limitation on these powers will always be found, although the form of the limitation is subject to considerable variation.

Unauthorized Borrowing.

From the above it will have been gathered that borrowing may be unauthorized in two distinct ways. The company may have no power, either express or implied. In that case any borrowing on behalf of the company is *ultra vires* the company. Or, whilst the company has power to borrow, the directors' right of exercise of the power may be limited. In that case, any borrowing beyond the prescribed limitations is *ultra vires* the directors, although *intra vires* the company. The effect of the *ultra vires* act is not the same in both cases.

If the borrowing is *ultra vires* the company, the company has purported to perform an act which it has no power to perform, and the effect is that there is in law no debt and no security. The whole transaction is void and incapable of ratification by the company. It would seem, however, that the lender of money which a company is not authorized to borrow has an equitable remedy, elaborately discussed by the House of Lords in the famous Birkbeck Bank case (*Sinclair* v. *Brougham*, 1914, A.C. 398), which entitles him to follow the money and recover it, if he can trace it, in the hands of the company, either in cash or

in the form of resultant property. The practical difficulty, of course, is that it is not very often possible to earmark money thus. Where, however, a company has power to borrow, but exceeds its authorized limit, the lender, although his security is valueless, may be an unsecured creditor of the company for so much of the money borrowed as has been applied in paying the lawful debts of the company (*Cork and Youghal Railway*, 1869, 4 Ch. App. 748).

If the directors borrow beyond the scope of their powers, although within the powers of the company, then their unlawful act, being *intra vires* the company, may be ratified by the company. The position of the lender in the case of borrowing *ultra vires* the directors is this. If the contents of the memorandum and articles of association of the company show the limitations on the power of the directors and those limitations are exceeded, then, the lender, having lent with constructive notice of the facts, the memorandum and articles being public documents (*Mahony* v. *East Holyford Mining Company*, 1875, L.R. 7 H.L. 869), cannot recover against the company; and, further, he cannot recover against the directors, seeing that, having notice of the facts, he was not misled. But if the borrowing was apparently in order, so far as the memorandum and articles showed, he would then be entitled to the benefit of the important rule in *Royal British Bank* v. *Turquand* (1855, 6 E. & B. 328; see p. 21), whereby he is at liberty to assume that all the internal affairs of the company have been regularly conducted, and he will be able to recover and to treat his security as valid.

Form of Clause Authorizing Borrowing.

The construction of the clause in the memorandum

of a company which authorizes borrowing is frequently of importance. On page 18 we have set out a common modern form of such a clause, which was drafted to meet various difficulties which had previously arisen. The clause begins, "To borrow, or raise." If the word "raise" be omitted, a company cannot issue perpetual or irredeemable debentures, which, as we have already seen, are in reality perpetual annuities (see p. 15). To borrow involves the idea of repayment at some time or other, and this idea is wanting in the case of irredeemable debentures (see *Southern Brazilian Rio Grande Company*, 1905, 2 Ch. 78). Again the precise wording of the clause may be of importance where it is proposed that the charge to to be given by the company shall include a charge upon its uncalled capital. If the power to charge uncalled capital be not expressly given (as it is in the clause on p. 18), there may be a question as to whether it is legally possible to charge it. There have been many decisions on the wording of borrowing clauses. which it is beyond the scope of this book to deal with, But it may be mentioned, as indicating the difficulty of the matter, that it has been held on the one hand that a power to charge "the property" of the company will not authorize a charge on uncalled capital, whilst a power to charge "the assets" of the company will authorize it.

In this connection it may be noticed that a power to borrow does not authorize a joint borrowing by the company and others. But the effect of such a transaction is that the company is liable to the lender for such portion of the joint loan as it has actually received, and any charge that it has given is valid to the extent of the money which it has received from the lender (In re *Johnston Foreign Patents*, 1904, 2 Ch. 234).

Power to Borrow: when first Exercisable.

The provisions of section 87 of the Companies (Consolidation) Act, 1908 must be observed in connection with borrowing. That section provides that a company shall not commence any business or exercise any borrowing powers until it has complied with certain formalities, after which it receives from the Registrar of Companies a certificate that it is entitled to commence business. The company, whether or not it issues a prospectus on its formation, accordingly cannot exercise any borrowing powers until it has complied with the section. But, by sub-section (6), the section does not apply to private companies, and these may therefore commence business and exercise their borrowing powers immediately after incorporation.

An important concession is, however, made by sub-section (4), which provides as follows: "Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures." The effect of this is that a company, if it issues a prospectus on its formation inviting subscriptions for its shares, may also at the same time offer its debentures, and it may allot debentures as well as shares, and may receive money payable on application for debentures, without contravening the section. And to have enabled it to offer the debentures, some resolution of the board must have previously been passed authorizing the borrowing. But an offer of debentures alone, before the company has obtained the certificate entitling it to commence business, would be prohibited by the section. If shares and debentures have been simultaneously offered and allotted, and subsequently the company

for some reason is unable to obtain the certificate, the money received must of course be returned to the lenders. The exercise of the company's borrowing powers in contravention of the section, renders every person responsible liable to a fine not exceeding £50 for every day during which the contravention continues (sub-sec. (5)). The section will be found set out in full on page 99.

By section 92 of the Act (see p. 101), unless the conditions of issue otherwise provide, the debentures or the certificates of debenture stock, as the case may be, must be complete and ready for delivery to the persons entitled within two months after any allotment of debentures or debenture stock; and similarly after transfer, the debentures, or certificates of debenture stock, must be complete and ready for delivery within two months. Default renders the directors and officers of the company liable to penalties.

CHAPTER IV

THE FORM OF A DEBENTURE

THERE is nothing in law which renders it necessary for a debenture to be framed in any stereotyped form. But it will be found that at the present day there is a certain general uniformity of type about the instrument, and that variations from this type are relatively small. It is proposed in this chapter to set out in full a fair specimen of a modern registered debenture, and to explain the reasons for, and the meaning of, the various clauses. The conditions are in the vast majority of cases indorsed on the document.

As regards the heading given on page 29, the greater part of it is unnecessary unless a Stock Exchange quotation is desired. The Stock Exchange regulations (see Appendix B, p. 130), require that a debenture should state on its face the authority under which the company is constituted, the nominal capital of the company, the dates when the interest on the debentures is payable, and the authority under which the issue is made (*i.e.*, the articles of association and resolutions); whilst on the back of the debenture must be stated the conditions of issue, redemption and transfer. In the form below, if no quotation is desired, the heading need merely comprise the name of the company and some such words as "Issue of 500 debentures of £100 each, bearing interest at 6 per cent. per annum."

[FORM OF REGISTERED DEBENTURE.]

THE A.B. COMPANY, LIMITED.

(*Incorporated under the Companies Acts,* 1908 *to* 1917.)

Capital £200,000, divided into 100,000 5½ per cent. cumulative preference shares of £1 each, and 100,000 ordinary shares of £1 each.

Issue of a series of 500 debentures of £100 each, carrying interest at 6 per cent. per annum payable half-yearly on the 1st day of January and the 1st day of July, authorized by clause 52 of the Company's articles of association and by a resolution of the directors dated the 23rd day of October, 1919.

No. 136 DEBENTURE. £100

1. The A. B. Co., LIMITED (hereinafter called "the Company") will on the 1st day of January, 1925, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to J. S., of 53 London Road, Reading, in the County of Berks, Merchant, or other the registered holder hereof for the time being, the sum of £100.

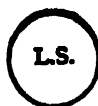
2. The Company will pay to such registered holder interest on the said sum of £100 until repayment thereof at the rate of £6 per cent. per annum by equal half-yearly payments on the 1st day of January and the 1st day of July in every year, the first of such payments, or an apportioned part thereof, to be made on the 1st day of July, 1920.

3. The Company hereby charges with such payments its undertaking and all its property both present and future, including its uncalled capital.

4. This debenture is issued subject to and with the benefit of the conditions indorsed hereon, which are to be deemed part of it.

Given under the common seal of the Company this 17th day of January, 1920.

The common seal of the Company was affixed hereto in the presence of—



C D, } Directors.
E F, }
X Y, Secretary.

The Conditions within referred to.

1. This debenture is one of a series of debentures of the company for securing principal sums not exceeding in the whole at any one time the sum of £50,000. The debentures of the said series, whether original or not, are all to rank *pari passu* in point of charge, without any preference or priority over one another, and such charge is to be a floating charge [but so that the company is not to be at liberty to create any mortgage or charge in priority to or *pari passu* with the said debentures].

2. The company will keep at its registered office a register of the debentures and will enter therein the names, addresses and descriptions of the registered holders and the particulars of the debentures held by them respectively. The register will be open during ordinary business hours to the inspection of the registered holder hereof and of his legal personal representatives and of any person authorized in writing by him or them.

3. The company shall not be bound to enter any notice of any trust, express, implied, or constructive in the register, and shall not be bound to recognize anyone as having any title to this debenture except the registered holder hereof; but so that the legal personal representatives of a deceased sole registered holder, and any person becoming entitled to this debenture by reason of the bankruptcy of any registered holder, shall, upon producing such evidence as the directors may from time to time require, have the same rights and be subject to the same provisions as are herein conferred on and declared concerning a registered holder of this debenture.

4. Every transfer of this debenture shall be in writing under the hand of the transferor, and any such transfer left at the registered office of the company together with a fee of 2s. 6d., and this debenture, and such other evidence as the directors may reasonably require to show the right of the transferor to transfer, shall be registered. On registration of any such transfer a note of the registration shall be indorsed on the debenture.

5. When this debenture is registered in the names of joint holders, the survivor or survivors of them shall be deemed to be the registered holder thereof, and any sole survivor shall be deemed to be the sole registered holder. Any notice by the company, and any cheque or warrant for interest, sent to the registered holder hereof under the provisions hereinafter contained may be sent to any one of such joint holders at his registered address or to such other person and/or address as he may direct.

6. All principal moneys and interest hereby secured shall subject to the provisions of the next condition be paid to the registered holder of this debenture without regard to any equities between the company and any prior holder of this debenture.

7. Any person becoming entitled to this debenture by reason of the death or bankruptcy of the registered holder shall, upon such evidence being produced as the directors may reasonably require, have the right to be registered as the holder hereof, but such registration shall not prejudice any right which the Company, but for the same, would have had against the deceased or bankrupt registered holder.

8. The principal moneys and interest hereby secured will, when the same become payable, be paid as follows, that is to say, the principal moneys at the registered office of the company, and the interest by cheque or warrant sent through the post in a prepaid letter addressed to the registered holder of this debenture at his registered address, or to such other person and/or address as he may direct.

9. The company may at any time give six calendar months' notice in writing to the registered holder hereof of its intention to pay off this debenture, and thereupon at the expiration of such period the principal moneys hereby secured shall become payable.

10. The principal moneys hereby secured shall immediately become payable on the happening of any of the following events, namely—

(a) If the company makes default for a period of three calendar months in payment of any interest hereby secured ;

(*b*) If an order is made on an effective resolution passed for the winding-up of the company;

(*c*) If any execution or sequestration or other process of any Court or authority is sued out against, or any distress levied upon, any of the property of the company;

(*d*) If a receiver is appointed of any of the property of the company;

(*e*) If the company ceases to carry on business.

11. At any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority of the outstanding debentures of this series, by writing appoint any person or persons to be a receiver or receivers of the property hereby charged, or may with the like consent remove any such receiver and appoint another in his place, and may fix the remuneration of any such receiver, provided always that any such receiver shall be the agent of the company and the company shall alone be responsible for his acts and defaults. And any receiver so appointed shall have power—

(*a*) To take possession of all or any part of the property and assets hereby charged;

(*b*) To carry on the business of the company in such manner as he may think fit;

(*c*) To sell or concur in selling any of the property hereby charged;

(*d*) To enter into any compromise or arrangement that he may deem expedient.

And all moneys received by such receiver or receivers shall, after providing for the matters specified in (i) (ii) and (iii) of section 24, subsection (8), of the Conveyancing and Law of Property Act, 1881, be applied in or towards the satisfaction of the outstanding debentures of this series *pari passu*. The foregoing provisions in this condition shall take effect by way of variation and extension of Sections 19 to 24 inclusive of the said Act, which provisions so varied and extended shall be deemed to be incorporated herein.

12. All notices may be given by the company to the registered holder hereof either personally or by post in a prepaid letter addressed to such holder at his registered address, or to such other person and/or address as he may direct.

13. Any notice if served by post shall be deemed to have been served within twenty-four hours from the time when the letter containing the same was put into the post office, and in proving such service it shall be sufficient to prove that such letter was properly addressed and put into the post office.

CLAUSE 1.—This, the debenture being under the seal of the company, is the covenant of the company to pay the principal sum to the registered holder, at the time when it becomes due. Although the word "covenant" does not appear in the form, none the less the agreement or undertaking of the company under seal constitutes in law a covenant, and may be sued upon as such.

A deed imports consideration. It is therefore unnecessary to express in a debenture under seal the consideration for which it is granted. Sometimes, however, the words, "For value received," or some similar expression, are inserted. It frequently happens that a debenture is issued as security for an advance which has previously been made to a company. In legal phraseology the consideration for the issue of the debenture is then a past consideration, which in the case of contracts not under seal is insufficient to support a promise. It has been laid down in the Courts that the mere existence of an antecedent debt is not valuable consideration for a security given by a debtor (*Wigan* v. *English and Scottish Law Life Assurance Company*, 1909, 1 Ch. 291; *Glegg* v. *Bromley*, 1912, 3 K.B. 474). This principle does not, however, appear to touch the validity of debentures under seal issued as security for a past debt, the decisions cited being in respect of cases where valuable consideration was necessary to the validity of an assignment under seal, either by statute or by the terms of a contract. Moreover, consideration will readily be implied in the case of security being in fact given and the creditor thereafter in fact refraining from pressing his debtor.

As regards the date fixed for payment, this will obviously vary according to the terms of the bargain. Where no fixed date is contemplated, *e.g.*, where the

amount secured is repayable on specified notice, or by periodic drawings, the clause will in general run as follows: "The A. B. Co., Ltd., etc., will as and when the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon pay to, etc." Reference to the conditions will then show when the principal is repayable.

CLAUSE 2.—The promise of the company to pay interest on the dates specified is also a covenant, and may be sued upon as such.

CLAUSE 3.—By this clause the security is created, and an equitable mortgage of the company's property constituted. See also Condition 1, whereby the charge is expressly declared to be a floating charge. The matter of the charge, the most important feature of a debenture, is dealt with in the next chapter (see p. 40).

CLAUSE 4.—The effect of this clause is simply to incorporate into the debenture the indorsed conditions.

The date at the foot should be the date on which the instrument is actually executed by the due affixing of the seal.

As regards the attestation clause, the seal must be affixed with such formalities as are prescribed by the articles of association of the company. These vary, but it is usual to provide that the seal shall only be affixed by the authority of the board, and in the presence of at least two directors, who must sign every instrument to which the seal is affixed, and that the secretary or some other person appointed by the directors shall countersign every such instrument. As has been seen above (see p. 21), an outsider dealing with a company is bound to acquaint himself with the company's regulations, so far as they are contained in public documents; but he is entitled

to assume that all matters of internal management have been duly carried out. Thus, a person taking a debenture, attested as above, would have to find out for himself by inspection of the company's articles that two directors and the secretary must attest the affixing of the seal, but he would be entitled to assume that the seal had been affixed under the authority of the board.

CONDITION 1.—The effect of this condition is to limit the issue to a stated sum, and to ensure that all the holders of debentures of the series are to rank equally and be treated alike. The words, "whether original or not," are important, and cover the case of the re-issue of redeemed debentures, or the issue of substituted debentures in their place, as permitted by section 104 of the Companies (Consolidation) Act, 1908 (see p. 108). Such debentures are to rank equally with those of the original issue. The re-issue of debentures is dealt with on page 71. The matter of the floating charge, and the effect of the insertion of the words enclosed in square brackets at the end of the condition, are dealt with in the next chapter (see p. 46).

CONDITION 2.—There is no obligation on a company to keep a register of debenture holders, although by section 100 of the Act (see p. 58) it is bound to keep a register of mortgages and charges. But, except in the case of an issue of debentures to bearer, it is in practice necessary to do so, unless merely a few isolated debentures and not a series are issued. The last part of this condition is unnecessary, since, by section 102 of the Act (see p. 107), every register of holders of debentures of a company must be open to the inspection of the registered holders of debentures, as well as of shareholders, for at least two hours daily,

and copies may be obtained on payment; the register may, however, be closed for such period or periods, not exceeding in the whole thirty days in any year, as may be specified in the articles. These provisions were first made by section 12 of the Companies Act, 1907. Before that time, in the absence of an express provision in the debentures themselves for inspection of the register, it was almost impossible for debenture holders to combine, for the purpose, for example, of opposing a variation of their rights, owing to the difficulty of inter-communication.

CONDITION 3.—This is an important clause, and relieves the company from the obligation of recognizing any but the registered holder of the debenture, or his legal personal representatives, as well as from the obligation of recognizing any kind of trust subsisting in respect of the debenture. The company is, however, of course, bound by any order of the Court, notwithstanding this provision.

CONDITION 4.—Freedom of transfer is almost invariably provided for in the case of an issue of debentures, and where a Stock Exchange quotation is desired it is essential (see Appendix B, p. 127). On the registration of a transfer, the transferee becomes the registered holder, and all the rights of the transferor vest in him; see also Condition 6. The clause frequently provides that the company may retain the transfer.

CONDITION 5.—The first part of this condition applies to the case of joint holders the principle of the right of survivorship, which is a legal incident of joint tenancies. As regards the latter part, it is often provided that notices, etc., shall be sent to the joint holder whose name stands first on the register.

CONDITION 6.—The effect of this is to protect the

transferee of the debenture against any claims, by way of set-off or otherwise, which the company may have against the transferor or any other prior registered holder. Under condition 4, however, the company may refuse to register a transfer, if it has any unsatisfied claim against the transferor, on the ground that the transferor's title to transfer is not clear.

A debenture is a chose in action. By section 25 (6) of the Judicature Act, 1873, assignments of choses in action are recognized, provided that the conditions there laid down are fulfilled. But such assignments are, by the statute, expressly made subject to equities. The object of Condition 6 is to exclude the statutory provision as to equities by a special contract between the company and the debenture holder, whereby the assignment or transfer of the debenture is enabled to be made without regard to existing equities.

CONDITION 7.—This is analogous to the ordinary transmission clause as to shares in the articles of association of a company.

CONDITION 8.—It is the law that, in the absence of provision to the contrary, a creditor must seek out his debtor and pay him. This procedure is here varied by providing that the principal money is to be paid at the office of the company, whilst interest is to be paid by cheque sent by post. The ordinary rule would prove highly inconvenient in practice.

CONDITION 9.—This is a common, but not a necessary, provision. Where it exists, it should be read in conjunction with Clause 1 of the debenture, which provides for repayment on a fixed date, or on such earlier date as is provided by the conditions. This condition provides for an earlier date at the company's option.

Sometimes the option lies with the debenture

holder, in which case the condition will provide that he may, on some specified notice, require the company to pay off the debenture.

It is often the case that early payment of the company's option is made to include the payment of a premium, in which case the condition will be worded accordingly.

CONDITION 10.—In this condition are set out some of the events on the occurrence of which it is commonly provided that the security shall become enforceable, or, in other words, the floating charge shall attach (see p. 42). The list is frequently curtailed, or may be extended indefinitely, according to the circumstances of the loan.

(*a*) is generally inserted in some shape, though the period of default varies. It is not unusual for some such words as the following to be added: "and the holder by notice in writing to the company calls in the principal moneys." These words are often useful, as it may not be desirable for the charge to attach automatically on default by the company in the payment of interest, without any act of volition on the part of the debenture holder.

(*b*) frequently concludes with the words "except for the purpose of reconstruction," an apparently useful reservation. But the words are valueless, since it was held in In re *Crompton & Co.* (1914, 1 Ch. 954) that, in spite of such a provision, the fact that the undertaking, on the security of which money has been borrowed, has come to an end by reason of a winding-up resolution, entitles debenture holders to realize their security.

CONDITION 11.—A condition, empowering a specified proportion of the debenture holders to appoint a receiver, when the principal moneys become payable, is

frequently inserted. Whether or not such a condition is present, the Court can, of course, appoint a receiver, but the power of so doing, without recourse to the Court, is often advantageous. The position of a receiver appointed by debenture holders is dealt with hereafter in Chapter VIII (see p. 78).

CONDITIONS 12 & 13.—The insertion of these conditions is a usual and proper business precaution, intended to preclude the possibility of disputes as to the due giving of notices by the company.

CHAPTER V

THE CHARGE

The essential feature of debentures, other than naked debentures (see p. 14), is the security for the loan, constituted by a charge on property of the company. The charge may be a fixed or specific charge, or a floating charge, or there may be a fixed as well as a floating charge.

Fixed and Floating Charges.

The distinction between a fixed and a floating charge may be explained in the words of Lord Macnaghten in *Illingworth* v. *Houldsworth* (1904, A.C. 355): "A specific charge, I think, is one that without more fastens on ascertained and definite property, or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." Another judicial explanation of the nature of a floating charge was given by Lord Macnaghten, in *Government Stock Investment Company* v. *Manila Railway* (1897, A.C. 81), in the following words: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such charge that it remains dormant until the undertaking

charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." Further, in In re *Yorkshire Woolcombers Association* (1903, 2 Ch. 284), which went to the House of Lords under the name of *Illingworth* v. *Houldsworth*, Romer, L.J., said that a mortgage or charge is a floating charge if it contains the three following characteristics: (1) If it is a charge on a class of assets both present and future; (2) If that class is one which in the ordinary course of business of the company would be changing from time to time; (3) If it is contemplated by the charge that, until some future step is taken by or on behalf of the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged.

Where there is a fixed charge, it is usually given over the immovable property of the company, *e.g.*, land and buildings, and the company can carry on its business as before, in spite of the charge, until circumstances arise which entitle the persons in whose favour the charge is created to enforce it. The existence of the fixed charge prevents the company from dealing with the property so charged, except subject to the charge; so that the company cannot (except with the consent of the mortgagee) sell such property, and can only mortgage it subject to the mortgage already existing. Generally, where there is a fixed charge to secure an issue of debentures, the charge is contained in a trust deed to secure the issue. The nature of a trust deed is explained below (see p. 47). But there is nothing to prevent a

debenture containing a fixed charge over certain property, as well as a floating charge over other property of the company.

A floating charge generally charges the whole of a company's undertaking and assets, both present and future, and frequently its uncalled capital is included. Or if there is a fixed charge on certain property, the remainder of the company's assets is charged by a floating charge. The essence of a floating charge is that the company may deal as it pleases with any of its property in the ordinary course of its business, until the holder of the charge becomes entitled to enforce his security. The conveniences of a floating charge as opposed to a fixed charge are thus apparent. Property subject to a fixed charge bears a definite burden. A bill of sale on chattels is simply a mortgage, and the chattels cannot be dealt with. If documents of title, such as deeds or share certificates are deposited as security for a loan, they cannot be dealt with. Except, therefore, in the case of land, buildings, etc., there are great disadvantages in a fixed charge.

When a Floating Charge Attaches.

A floating charge attaches, or crystallizes, or becomes enforceable, when the company ceases to be a going concern (In re *Borax Company*, 1901, 1 Ch. 326; *Illingworth* v. *Houldsworth*, 1904, A.C. 355), or when by the conditions of the debenture the charge attaches. These conditions may differ considerably according to the circumstances of the loan; see, for example, conditions 9 and 10 of the specimen form printed in the previous chapter (p. 31), and the notes on those conditions (p. 37). But, apart from any conditions, the charge attaches on the company stopping business, or on a winding-up commencing,

or on a receiver being appointed, and conditions providing for the security becoming enforceable in any of those events are strictly speaking unnecessary, although not unusual.

Features of a Floating Charge.

The following points in connection with a floating charge are worthy of attention as affording indications of its scope :—

1. A floating charge, without more, leaves the company free to carry on its business in the ordinary way without regard to the existence of the charge. It may deal with and dispose of the property charged in the ordinary course of its business. In order to see how far a company may go, it is necessary to consider the nature of its business; and the objects clause in the memorandum of association, which shows the limitations on the company's powers, should be carefully inspected. Speaking generally, a company carrying on an ordinary trading business, may in the usual course, sell any of its assets, grant mortgages, make leases, pay its debts, and enter into other transactions affecting the property over which the floating charge exists. In In re *H. H. Vivian & Co., Ltd.* (1900, 2 Ch. 654) the objects of the company were to acquire and carry on three distinct businesses. The company also had power in its memorandum of association to sell all or any part of its property. The Court refused, at the instance of debenture holders having a floating charge over the whole undertaking, to restrain the sale of one of the company's businesses. Even more strongly in favour of a company was *Foster* v. *Borax Company* (1901, 1 Ch. 326), where the objects of the company included (as is common) the sale of the undertaking

or any part of it. The company agreed to sell the whole of its undertaking, except a few securities which it retained, in consideration of shares and debenture stock of a new company, the vendor company undertaking not to carry on any similar business, except for the benefit of the new company. The debenture holders of the vendor company, who were entitled to the benefit of a floating charge of the usual type, sought to prevent the agreement from being carried out, but the Court of Appeal held that the existence of the floating charge did not impede and could not prevent the sale.

2. The position of execution creditors requires brief notice. As regards execution by writ of *fi. fa.*, the position is that if, after the sheriff has seized the goods of the company, but before he has sold, the floating charge attaches, the debenture holder takes priority over the execution creditor. If, however, the sheriff has actually sold the goods before the charge attaches, the execution creditor is entitled, as against the debenture holder, to the fruits of his diligence. As regards attachment of debts by garnishee proceedings, if the charge attaches after the garnishee order nisi, but before the garnishee order absolute, the debenture holder takes priority. And he retains his priority even after the order absolute, if before actual payment the charge attaches and he applies for relief (*Sinnott* v. *Bowden*, 1912, 2 Ch. 414; *Robson* v. *Smith*, 1895, 2 Ch. 118). But, in order that the right of the holder of a floating charge may prevail over that of the person who has obtained the garnishee order, he must have done something to make his charge effective, *e.g.*, by appointing a receiver: a mere notice by the debenture holder that he claims the money in the hands of the garnishee

is ineffective (*Evans* v. *Rival Granite Quarries*, 1910, 2 K.B. 979).

3. It need hardly be pointed out that a floating charge is in a winding-up (on the commencement of which it automatically attaches) valid against the general creditors of a company. For the holder of the floating charge is a secured creditor, and entitled to the benefit of his security. But by section 212 of the Companies (Consolidation) Act, 1908 (see p. 116), a floating charge created within three months of the winding-up is only good to the extent of the amount actually advanced to the company at the time of, or subsequently to, the creation of the charge, with interest at 5 per cent., unless the company was solvent at the date when the floating charge was given. And by section 107 of the Act (see p. 81), the preferential claims payable in priority to all other debts by virtue of section 209 of the Act (see p. 113), as extended by section 110 of the National Insurance Act, 1911, must be paid out of the assets coming to the hands of any receiver appointed by the debenture holders, or any person taking possession on their behalf, before any claim for principal or interest by the debenture holders.

4. In the absence of any agreement to the contrary (as to which see p. 46), the existence of a floating charge does not prevent the company from creating any specific or fixed charge ranking in priority to the floating charge. The company may also create a fixed charge ranking after the floating charge. And it has been held that, even if the holder of a fixed charge, created after the floating charge, but ranking in priority to it, had notice of the floating charge, he still retains his priority (In re *Hamilton's Windsor Ironworks*, 1879, 12 Ch. Div. 707).

Prohibition of Prior or Pari Passu Charges.

It will frequently be found that Condition 1 of a debenture, after declaring the floating charge, proceeds to prohibit the company from creating mortgages or charges ranking in priority to or equally with the debentures. A common form of such a clause is in these words: "But so that the company is not to be at liberty to create any mortgage or charge in priority to or *pari passu* with the said debentures" (see p. 30). It is obvious that such a condition may prove very embarrassing to a company and may hamper it in its business. It destroys, in fact, one of the main advantages of the floating charge, the object of which is to ensure freedom of action. A clause of this kind should never be inserted in a debenture without careful consideration. In general, it appears only in cases in which the lender is dissatisfied with the floating security unless it is fortified by the inclusion of the prohibition, and companies permit its inclusion only, as a rule, when they are forced to do so. The prohibition is valid and effective, being simply a matter of contract. And it is equally clear that, in its absence, mortgages and charges may be created (*Wheatley* v. *Silkstone Coal Company*, 1885, 29 Ch.D. 715; see also *Cox-Moore* v. *Peruvian Corporation*, 1908, 1 Ch. 604).

Questions sometimes arise in cases where the prohibition exists as to the rights of subsequent mortgagees, and these questions are often complicated by disputes as to facts. But the general principles are sufficiently clear. If a company creates a mortgage in favour of a person who has notice of the floating charge, and also of the clause prohibiting other mortgages, his mortgage will rank after the debentures. But a person who, with a legal mortgage created

after the floating charge, satisfies the Court either that he did not know of the charge at all, or that, although knowing of the charge, he did not know of the prohibition, will take priority over the floating charge (*English and Scottish Mercantile Company* v. *Brunton*, 1892, 2 Q.B. 700). And the same will be the case if he is only an equitable mortgagee by deposit of title deeds (In re *Castell & Brown*, 1898, 1 Ch. 315).

Trust Deeds.

As has been seen above, a charge is often contained in a trust deed securing an issue of debentures or debenture stock. An issue of debenture stock is almost always secured by a trust deed, and it is seldom the case that a debenture stock certificate contains any charge, the charge being contained in the trust deed alone. In the case of debentures, where the issue is secured by a trust deed, the debentures themselves very frequently contain a charge, and the trust deed also contains a charge.

The object of a trust deed may be stated to be to fortify the security. Where a fixed charge is given over specific property, such as land and buildings, a trust deed is generally resorted to, and the specific property, if freehold, is generally actually conveyed to the trustees, whilst leaseholds are sub-demised to them; and there is a provision that on payment of all sums due to the stock holders, or debenture holders, the premises are to be reconveyed and released to the company. In some cases the conveyance to the trustees is framed as a mortgage, whether of freeholds, or of leaseholds by sub-demise, and is made subject to the usual proviso for redemption. Besides the specific charge, effected as above stated, the trust deed also contains a general charge in favour of the

trustees over all the remainder of the company's property, and this general charge is a floating charge. Thus, in the case of an issue of debentures, there may be, and commonly is, a floating charge contained in the trust deed in favour of the trustees, and a floating charge contained in the debentures themselves in favour of the debenture holders.

The debentures themselves, or the debenture stock certificates, by one of the conditions indorsed thereon, declare the holder to be entitled *pari passu* to the benefit of, and subject to the provisions of, the trust deed, the terms of which are thus incorporated in the debentures or certificates.

The chief advantages of a trust deed are that, in general, the specific property charged actually vests in the trustees, who are thus able, if and when the security becomes enforceable, to deal with it as the actual owners; and that, whether or not this is the case, the trustees, as representing the whole body of debenture holders or debenture stock holders, can act more conveniently on their behalf.

The Contents of a Trust Deed.

A trust deed is a long and somewhat cumbersome document, and it will be sufficient here to summarize its main provisions (premising that the parties to it are the company of the one part, and the trustees of the other part), as follows—

1. In the case of debenture stock, the trust deed begins by acknowledging that the company is indebted to the trustees in the amount of the total debt and interest at the prescribed rate, and provides that the stockholders are to be regarded as the beneficial owners of their respective shares of the stock.

2. Then follow clauses embodying the fixed charges,

if any, the property specifically charged being actually conveyed, or demised, or assigned, whether absolutely or by way of mortgage, to the trustees. A clause creating a floating charge on all the other assets in favour of the trustees is added.

3. Next comes a clause whereby the trustees permit the company to remain in possession of the property charged, and to carry on its business thereon, until the security becomes enforceable and is actually enforced by the trustees taking possession or appointing a receiver.

4. The events in which the security is to become enforceable are specified. In the case of debentures, these ordinarily correspond with those set out in the debentures themselves (see, *e.g.*, Condition 10, p. 31).

5. A group of clauses is inserted which enable the company, with the consent of the trustees, or the trustees, with the consent of the company, whilst the company is carrying on its business, to deal with the property which is specifically charged, by way of sale, lease, exchange, partition and otherwise. These provisions may be of great benefit to a company, which will thus not be unduly hampered in its business.

6. Provision is made for enabling the trustees to invest capital moneys arising from any such dealing as is permitted by (5), or to utilize it for the acquisition of other property, making improvements in existing property of the company, or for other purposes.

7. Provision is made for the enforcement of the security by the trustees, when such a course becomes possible by the terms of the bargain between the parties. The trustees are given power to take possession of the property and to appoint a receiver.

Sometimes it is provided that this drastic power is not to be exercised without giving the company a reasonable opportunity of remedying the default which has made the power exercisable.

8. The trustees are given wide powers of carrying on the business of the company after the power of entry and appointment of a receiver have been exercised. Sometimes a power to borrow is included.

9. Provision is made for the company keeping up the value of the property charged by repairing, insurance and otherwise, with power to the trustees in case of default by the company to repair, insure, etc., at the company's expense. The company is also required to carry on its business in a proper manner, and to keep proper books of account, and to afford the trustees facilities for inspection both of the premises and of the books.

10. The deed concludes with a variety of miscellaneous provisions, including provisions relating to the remuneration of the trustees, appointment of new trustees, delegation by the trustees of their powers, reconveyance and release of the mortgaged property, the incorporation of the schedules (see below) in the deed, and other matters.

The Schedules to a Trust Deed.

A debenture trust deed generally includes three schedules.

The first schedule, in the case of an issue of debentures, sets out in full a form of the debenture, together with its indorsed conditions. In the case of debenture stock, the schedule may consist of the form of debenture stock certificate, with conditions similar *mutatis mutandis* to those on a debenture; or the schedule may be headed "Conditions of Issue

of Debenture Stock," in which case the conditions will be set out in full, one of them embodying a form of certificate, without, of course, any indorsed conditions.

The second schedule contains short particulars of the property specifically charged, whether freehold, leasehold, or copyhold.

The third schedule, which is of great importance, contains provisions for the convening and holding of meetings of the debenture holders, or debenture stockholders, as the case may be. These provisions bear a general resemblance to the provisions relating to meetings contained in the articles of association of a company, the length of notice, the quorum, the chairman, voting rights, etc., being dealt with in detail. But the important feature of the schedule is that by it a specified majority of the holders is empowered to bind the minority in respect of certain matters there detailed. A provision of this nature is valid (*Follit* v *Eddystone Granite Quarries*, 1892, 3 Ch. 75). In general, the matters in respect of which the minority may be bound are the sanction of the release or surrender of any of the mortgaged property, agreement to a compromise or arrangement between the company and the holders, of such a nature as the Court might sanction under section 120 of the Companies (Consolidation) Act, 1908 (see p. 111), and assent to any modification or variation of the provisions of the trust deed. Provisions of this kind, though valid, will be construed strictly, and the Court will only permit the majority to bind the minority in regard to matters definitely provided for by the terms of the schedule. For instance, a power to release the mortgaged property does not include a power to release the company; a power to modify

the rights of the debenture holders does not include a power to relinquish their rights; a power to compromise their rights presupposes some dispute about them, or difficulty in enforcing them, and cannot be exercised where there is no such dispute or difficulty (*Mercantile Investment Trust Company* v. *International Company of Mexico*, 1891, reported in footnote to *Sneath* v. *Valley Gold*, 1893, 1 Ch. 477).

As regards the nature of the majority required, this varies in different cases. Sometimes the quorum is fixed at one tenth in value of the holders of the stock or outstanding debentures, and the resolution must be an extraordinary resolution, *i.e.*, passed by a three-fourths majority (see sec. 69 of the Companies (Consolidation) Act, 1908). Or the resolution required may be a special resolution (see sec. 69 of the Act), or the quorum may be much larger.

Stock Exchange Requirements.

If an official quotation on the Stock Exchange is desired, the trust deed should contain certain provisions. These are in effect as follows: (1) If the security is repayable at a premium, either at a fixed date or on notice, the trust deed must provide that, in the event of the company going into voluntary liquidation for the purpose of reconstruction or amalgamation, the security must not be repayable at a lower price; (2) There must be a clause providing that the statutory power of appointing new trustees shall be vested in the company, but any trustee so appointed must be approved by a resolution of the debenture holders, or debenture stockholders, passed as provided by the third schedule; further that a corporation or company may be appointed a trustee; (3) The trustees must convene a meeting upon the

written requisition of holders of at least one-tenth of the outstanding debentures or debenture stock; (4) In order to pass an extraordinary resolution, the quorum must consist of the holders of a majority in value of the stock or debentures present in person or by proxy, and the resolution must be passed by a three-fourths majority; (5) If the debentures or debenture stock are called "First Mortgage Debentures," or "First Mortgage Debenture Stock," provision must be made for the creation of a specific first mortgage in favour of the debenture holders or debenture stock holders. The Stock Exchange regulations will be found set out in full in Appendix B (p. 129).

The Trustees.

As regards the trustees, they should, if persons, be of the highest standing and unimpeachable position, and should be independent of the company. There is nothing inherently wrong in a director of the company being appointed a trustee, but in practice it is inconvenient, and may lead to difficulties. A trustee should have his residence in the United Kingdom, since his presence may be required at any time, and much delay and inconvenience would arise were he resident abroad. A practice, which has become increasingly common, has arisen of appointing a reputable company, amongst the objects of which is the undertaking of trusts, as trustee, and this practice has much to recommend it, since difficulties arising through the illness, death, or absence of a trustee are thereby avoided. Moreover, such companies, being accustomed to the duties of office, are often more efficient than individuals, however high their position.

Foreign Property.

A fixed or specific charge over property in this country can be readily effected in accordance with the law of the land so as to constitute a completely effective security. But where a company owns foreign property, the question of effectually charging it frequently presents great difficulties. Where such property is immovable, *e.g.*, land and buildings, it must be dealt with according to the law of the country where it is situated, if the security is to be unimpeachable. But it often happens, for various reasons, that a security effective in foreign law is impracticable, in which case means must be devised to fortify the security as far as possible without compliance with the local law. These means must necessarily vary in each case, and they are not within the scope of this book. But, in spite of the fact that debenture holders may have but an imperfect security over foreign assets of the company, their position is nevertheless greatly strengthened by the fact that, since equity acts *in personam*, the Courts here will give them all the assistance in their power, *e.g.*, by means of the appointment of a receiver, or the granting of an injunction, in appropriate cases.

Statutory Companies.

It should be added that in the case of what are known as statutory companies, that is to say, companies incorporated by special Acts of Parliament in order to work undertakings for the benefit of the public at large, or of a section of the public (such as railway companies, water companies, dock and harbour companies, and the like), the security which can be given over their assets is generally incomplete. Since such companies manage and work their

undertakings primarily for the benefit of the public, the Court will not, at the instance of their debenture holders, order a sale of their property, nor will it, appoint a manager, although a receiver of the income will be appointed in a proper case.

CHAPTER VI

REGISTRATION OF MORTGAGES AND CHARGES

THE existing system of registration of mortgages and charges created by a company is statutory. The object of registration is to ensure sufficient publicity, the policy of the relevant statutory provisions being to enable persons dealing with the company, and other persons concerned, to ascertain from official records the amount and nature of the secured indebtedness of a company. The same policy is to be found in the Bills of Sale Acts, 1878 and 1882.

As has been stated in an earlier chapter (see pp. 11 and 35), it is the practice of companies issuing a series of debentures, other than debentures to bearer, or issuing debenture stock, to keep at the company's office a register of debenture holders, or debenture stock holders, which is to be open gratis to the inspection of the holders, or their agents or representatives. This system of registration, however, is merely a matter of private contract, arranged for the benefit of all parties concerned, and is not obligatory. Whether or not such a register exists, the statutory requirements as to registration must be complied with.

Inapplicability of the Bills of Sale Acts.

The Bills of Sale Acts, 1878 and 1882, do not, as has been decided, apply to the mortgages or charges of a company. Section 17 of the Act of 1882 enacts that "Nothing in this Act shall apply to any

debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels and effects of such company." Section 3 of that Act provides that "This Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act," *i.e.*, with the Bills of Sale Act, 1878. Attempts have from time to time been made to show that certain documents of companies were not entitled to the benefit of this exemption, but in In re *Standard Manufacturing Company* (1891, 1 Ch. 627), it was laid down by the Court of Appeal that "The mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not upon the true construction of the Bills of Sale Act, 1878, bills of sale within the meaning of that Act." And in *Richards* v. *Kidderminster Overseers* (1896, 2 Ch. 212), it was held that trust deeds need not be registered under the Bills of Sale Acts. The law is thus settled that the Bills of Sale Acts have no application to borrowings on debentures by a company, although the charge may be a charge upon personal chattels. It may be added that, at the time of the decision in the *Standard Manufacturing Company* case, the only provision for the registration of the mortgages and charges of a company incorporated under the Companies Acts was section 43 of the Companies Act, 1862 (now sec. 100 of the Companies (Consolidation) Act, 1908, set out on p. 106), providing that a company must itself keep a register of mortgages and charges. The more important system of registration with the Registrar of Companies was first enacted by the Companies Act, 1900, and the *ratio decidendi* in the

Standard Manufacturing Company case is thus considerably strengthened.

The existing system of registration of the mortgages and charges of a company is a dual system. The company is required itself to keep a register of mortgages and charges, and it is further required to register particulars of them with the Registrar of Companies.

The Company's Register.

By section 100 of the Companies (Consolidation) Act, 1908, (see p. 106), every limited company is required to keep a register of mortgages, and to "enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto."

This register should constitute a complete record of the secured indebtedness of a company, which, as will be seen below, the register kept by the Registrar of Companies may not do. An overdraft at the company's bank, which is borrowing (*Cunliffe Brookes & Co.* v. *Blackburn Benefit Society*, 1885, 9 A.C. 857), must, if secured by the deposit of shares of the company, be entered in the company's register, although, if secured by the guarantee of directors or others, it need not be so entered, since there is no mortgage or charge on property of the company.

A company is also required by section 93, sub-sec. (9), of the Act (see p. 104), to keep at its registered office a copy of every instrument creating any mortgage or charge which is required to be registered with the Registrar of Companies. In the case of a series of

uniform debentures, a copy of one such debenture is sufficient.

Both the company's register, and the copies required to be kept there, may be inspected at all reasonable times, by members and creditors of the company without fee, and by any other person on payment of a fee of not more than 1s. for each inspection (sect. 101 (1); see p. 107). The register is thus made easily accessible to all.

Penalties are prescribed, to which the company's officers are liable, for knowingly and wilfully permitting any required entry to be omitted, and for refusing inspection (sec. 101 (2); see p. 107).

The effect of non-registration by the company in its register of any mortgage or charge is not to invalidate the security (*Wright* v. *Horton*, 1887, 12 A.C., 371), but merely to render the directors, etc., liable to penalties.

The Somerset House Register.

The existing system of the public registration of mortgages and charges of a company is provided for by section 93 of the Companies (Consolidation) Act, 1908 (see p. 101), which makes it obligatory, in the case of companies registered in England or Ireland, but not in Scotland, for certain particulars to be registered with the Registrar of Companies. By section 285 of the Act, "the Registrar of Companies," or, when used in relation to the registration of companies, "the Registrar," means the registrar or other officer performing under the Act the duty of registration of companies in England, Scotland, or Ireland, or in the Stannaries, as the case requires. The effect of section 243, sub-sec. (8) of the Act, is that in England the Registrar of Companies, at Somerset

House, London, is the official with whom the particulars must be registered, and in Ireland the Assistant Registrar of Companies, at Custom House, Dublin. The provisions of the Act as regards the registration of mortgages and charges do not apply to Scotland. Accordingly the Scottish Registrar of Companies, at Exchequer Chambers, Edinburgh, is not required to keep a register.

Section 93, sub-sec. (1) (see p. 101), provides for the registration of six classes of mortgages and charges created after July 1st, 1908, namely—

(*a*) A mortgage or charge for the purpose of securing any issue of debentures.

(*b*) A mortgage or charge on uncalled share capital of the company.

(*c*) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale.

(*d*) A mortgage or charge on any land, wherever situate, or any interest therein.

(*e*) A mortgage or charge on any book debts of the company.

(*f*) A floating charge on the undertaking or property of the company.

It should be mentioned that, under the Companies Act, 1900, particulars of the classes of mortgages and charges (*a*), (*b*), (*c*) and (*f*) were required to be registered. Classes (*d*) and (*e*) were added by the Companies Act, 1907, which came into force on 1st July, 1908. Under the Act of 1907 a company was obliged within three months after 1st July, 1908, to send to the Registrar for registration a statement of the total amount of the outstanding indebtedness of the company, as at 1st July, 1908, secured by mortgages or charges of the above six classes, except such as had

already been registered under the Act of 1900, *i.e.*, classes (*a*), (*b*), (*c*) and (*f*). This temporary provision was not re-enacted by the Consolidation Act of 1908, since it had served its purpose; but the combined result of all the above statutory provisions is that the register of the Registrar of Companies should contain—

1. The statutory particulars of mortgages and charges, registered under Section 14 of the Act of 1900, *i.e.*, classes (*a*), (*b*), (*c*) and (*f*), created on or after 1st January, 1901, and before 1st July, 1908.

2. A statement of the total amount of the company's secured indebtedness in respect of mortgages and charges of the classes (*a*) to (*f*), created at any time before 1st July, 1908, except those particulars of which were already registered under (1).

3. The statutory particulars of mortgages and charges of all the classes (*a*) to (*f*) created on or after 1st July, 1908, whether registered under the Companies Act, 1907, or under the Companies (Consolidation) Act, 1908.

A little reflection will show that, in spite of the apparent comprehensiveness of the system, the Registrar's register will not necessarily be a complete detailed record of a company's secured indebtedness. For as regards charges of all the six classes, particulars of these, if created before 1st January, 1901, will not appear, whilst as regards classes (*d*) and (*e*), particulars of these, if created before 1st July, 1908, will not appear, although the total amount of the outstanding secured indebtedness of the company in respect of such charges as at 1st July, 1908, will be shown. This, however, being merely a total figure, will not afford much information.

There is, however, the more serious defect that the six classes do not include every sort of mortgage or

charge. For example, loans secured by the deposit of shares, or by the deposit of acceptances, warrants or other negotiable instruments, need not be registered. However, since the company's own register of mortgages and charges, which has been required to be kept ever since the Companies Act, 1862, came into force, should contain particulars of all mortgages and charges affecting property of the company, without any exception, and since this register may now be inspected by anyone (see p. 59), these deficiencies in the Registrar's register are perhaps not of very great importance.

As regards class (*d*), it is expressly provided by the Act (sec. 93, sub-sec. (1); see p. 102), that the holding of debentures, entitling the holder to a charge on land, shall not be deemed to be an interest in land. Thus, a mortgage or charge secured by a deposit of debentures, which are secured on land, is not to be deemed a mortgage or charge on an interest in land, and accordingly need not be registered. It has been held that where part of property specifically charged by a trust deed (see p. 47), is sold, and a lease obtained of other property, which is mortgaged by sub-demise to trustees, such sub-demise, as giving the trustees a specific charge not previously existing, requires registration (*Cornbrook Brewery Company* v. *Law Debenture Corporation*, 1904, 1 Ch. 103). But where the trustees sell part of the mortgaged property and with the proceeds purchase other property to be held subject to the trusts, the conveyance does not require registration (*Bristol United Breweries* v. *Abbot*, 1908, 1 Ch. 279; see also *Cunard Steamship Company* v. *Hopwood*, 1908, 2 Ch. 564).

As regards class (*e*), section 93, sub-sec. (1) (see p. 102), expressly exempts from registration the deposit,

to secure an advance, of a negotiable instrument given to a company to secure payment of any of its book debts. Thus, if an acceptance, given to a company as security for the payment of a book debt, is deposited to secure an advance, or is discounted, the transaction does not require registration.

As regards class (*f*), the nature and characteristics of a floating charge are discussed in Chapter V (p. 40).

The criterion as to the necessity for registration is the creation of a mortgage or charge of one of the six classes, and difficult questions may arise as to whether or not registration is necessary in particular cases. Companies ordinarily desire to avoid the publicity of registration where possible. The decision in *Jackson* v. *Bassford* (1906, 2 Ch. 467), may often be of assistance in determining whether or not registration is necessary. The effect of this decision is that an agreement to give security, if expressed so as to create a present equitable right to a security, requires registration, but not an agreement so expressed as to be merely an agreement that in some future circumstances a security shall in the future be created.

The register is open to the inspection of any one, on payment of a fee not exceeding 1s. for each inspection (sec. 93 (8) ; see p. 104).

Time for Registration.

By section 93 (1) of the Act (see p. 102), the particulars prescribed, *i.e.*, by the Board of Trade (see sec. 285 of the Act), together with the instrument, if any, by which the mortgage or charge is created or evidenced, must be delivered to or received by the Registrar of Companies within twenty-one days from the date of the creation of the mortgage or charge.

What is the date of the creation of a mortgage or charge is not in all cases clear. In the case of a mortgage, trust deed, or other instrument, which expressly creates a mortgage or charge in favour of any person or persons, the date of the execution of the instrument is obviously prima facie the date of the creation of the mortgage or charge (see *Appleyard* v. *New London & Suburban Omnibus Company*, 1908, 1 Ch. 621). And the case of a series of debentures is expressly provided for by section 93 (3) of the Act (see p. 103), which enacts that "where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series" certain particulars, together with the deed containing the charge, or, if there is no deed, one of the debentures of the series. Thus, in this case, the twenty-one days run from the execution of the deed, if any, or, if none, from the execution of any debenture of the series. It is further provided that, where more than one issue is made of debentures in the series, particulars of the date and amount of each issue must be sent to the Registrar, although the omission to do this is not to affect the validity of the debentures issued.

The case of a single debenture is more difficult, and it seems doubtful whether the date of its execution is the date of the creation of the charge, from which the twenty-one days run, or whether the charge may not be created by an agreement entered into

before the actual execution of the debenture, in which case the decision in *Jackson* v. *Bassford* (1906, 2 Ch. 467; see above, p. 63), may be applicable.

Mortgages on Foreign Property.

Where a mortgage or charge comprising solely property outside the United Kingdom is created outside the United Kingdom, the period of twenty-one days for registration runs from the date when a copy of the instrument creating or evidencing the mortgage or charge, verified as prescribed by the Board of Trade, could have been received in the United Kingdom in due course of post and if despatched with due diligence. Where a mortgage or charge comprising property outside the United Kingdom is created in the United Kingdom, the instrument creating or purporting to create it may be sent for registration, although further proceedings may be necessary to validate the mortgage or charge according to the law of the country in which the property is situate (sec. 93 (1); see p. 102).

Duties of the Company.

The duties of a company in the matter of registration may be summarized as follows—

1. The registration must be effected within twenty-one days (see above).

2. In the case of a mortgage or charge, other than a charge to the benefit of which the holders of a series of *pari passu* debentures are entitled, the particulars required to be registered are those contained in Form No. 1, which will be found in Appendix A on p. 119. These particulars, it will be observed, include the "Amount or rate per cent. of the commission, allowance or discount (if any) paid or made either directly

or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the debentures included in this return." The deposit of debentures to secure a debt of the company is not, however, to be treated as the issue of debentures at a discount (sec. 93 (1); see p. 62).

3. In the case of a series of debentures containing, or giving by reference to any other instrument (*e.g.*, a trust deed), any charge to the benefit of which the debenture holders of that series are entitled *pari passu*, the particulars contained in Form No. 2 (Appendix A, p. 121), must be registered, together with the trust deed, if any; if there is no trust deed, then one of debentures must be registered (sec. 93 (3); see p. 103). Should more than one issue of debentures in the series be made, then in the case of each issue the particulars contained in Form No. 3 (Appendix A, p. 123) must be registered.

4. On receiving the Registrar's certificate of registration, the company must cause a copy thereof to be indorsed on every debenture or certificate of debenture stock issued. If, however, any such debenture or certificate of debenture stock has been issued before the creation of the mortgage or charge, this requirement is dispensed with (sec. 93 (6); see p. 104).

Should the company fail to effect registration as required by section 93 (7), the registration may be effected by any party interested, and such person may recover from the company any fees properly paid by him to the Registrar on registration (sec. 93 (7); see p. 104). Failure on the part of the company to register, except where the registration has

been effected by some other person, renders the company, its officials, and every other person who is knowingly a party to the default (*e.g.*, a lender who has held up the registration in order that the company's credit should not be affected) liable to penalties (sec. 99; see p. 106).

Registration in connection with receivers is dealt with in Chapter VIII, at page 80.

Effect of Non-Registration: Relief.

In default of registration, the mortgage or charge will be void against the liquidator and any creditor of the company, and on its so becoming void (*i.e.*, at the expiration of the twenty-one days allowed for registration) the money secured will immediately become payable (see sec. 93 (1); see p. 102). The lender thus becomes an unsecured creditor of the company.

There are two exceptions to this provision. In the case of more than one issue of debentures in a series, failure to register the date and amount of each issue does not invalidate the security (sec. 93 (3); see p. 103). Further, the omission to include in the particulars registered particulars of the commission, discount, etc., on debentures issued does not affect the validity of the debentures (sec. 93 (4); see p. 103).

Provision is made by section 96 of the Act (see p. 105) for the rectification of the register of mortgages and charges, in certain cases where registration has not been effected within the prescribed twenty-one days, or where any of the particulars required to be registered have been omitted or misstated. Where the failure to register, or the omission or misstatement, "was accidental, or due to inadvertence or some other sufficient cause, or is not of a nature to prejudice

the position of creditors or shareholders of the company," or where "on other grounds it is just and equitable to grant relief," and a Judge of the High Court is satisfied that such is the case, he may, on such terms and conditions as seem to him just and expedient, order the time for registration to be extended, or the omission or misstatement to be rectified, as the case may be.

The application is in practice made in the Chancery Division of the High Court, by originating motion, supported by affidavit evidence of the facts.

Although "ignorance of the law excuseth no man," yet, assuming that the Court is satisfied as to the *bona fides* of the applicant, and the mischief is not irreparable, an application will in general be granted, although the rights of parties acquired before the time when the debentures are actually registered will ordinarily be protected by a suitable proviso in the order of the Court. Applications of this kind were far commoner soon after the Act of 1900 came into force than they are at the present time, when the necessity for registration is, or should be, familiar to all parties concerned with the mortgages and charges of companies. It is not therefore thought necessary to refer here to any of the decisions on section 96 of the Act.

Entry of Satisfaction.

A company, or person interested, may, on furnishing the Registrar with evidence to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and, if required, must furnish the company with a copy thereof (sec. 97; see p. 106). This provision

is not obligatory, but, inasmuch as it is obviously to the advantage of a company that the official record of its secured indebtedness should not be inflated by amounts which have been satisfied, companies almost invariably take advantage of it.

A form of Memorandum of Satisfaction of mortgage or charge verified by declaration will be found on page 124 (Appendix A, Form No. 4).

CHAPTER VII

THE RE-ISSUE OF REDEEMED DEBENTURES

ALTHOUGH the legislation on the subject of the re-issue of redeemed debentures is confined to a single section of the Companies (Consolidation) Act, 1908 (sec. 104; see p. 108), the topic is of sufficient importance to warrant consideration in a separate chapter, the section, following section 15 of the Companies Act, 1907, having removed certain great difficulties which formerly existed.

These difficulties were, to a large extent, the result of a series of judicial decisions, the inconveniences of which will at once be apparent. In *George Routledge & Sons* (1904, 2 Ch. 474) it was held that, where a company purchased some of its own debentures on the market, the debt was gone and the security had consequently ceased to exist; and that the transferees from the company of these debentures, which were part of a series, had acquired nothing, and were not entitled to receive new debentures ranking with the rest of the series. In re *Tasker* (1905, 2 Ch. 587) decided that where debentures were issued as security for a loan and were registered in the name of the lender, and, on the loan being paid off, the debentures were handed back to the company accompanied by blank transfers, and were subsequently transferred to others, the transferees were really the holders of new debentures, not entitled to rank with the original debenture holders; for the original debentures had, by being paid off, been redeemed and were dead. This decision was followed

in *London Investment Trust* v. *Russian Petroleum Company* (1907, 2 Ch. 540), where the material facts were substantially the same. The case of *In re Perth Electric Tramways* (1906, 2 Ch. 216) went a step further, and decided that the deposit of an unregistered debenture, sealed in blank, without name or date, to secure a temporary loan, was an issue of that debenture, so that it could not be re-issued on repayment of the loan.

The result of these cases was to deprive the holders of debentures, which had been re-issued, either after they had been purchased by the company itself, or after they had been issued to or deposited with a lender as security for a loan which had since been paid off, of their security; since, even if the company's power to borrow had not been exhausted, in any case the re-issued debentures would rank after other securities created before their re-issue.

A further debatable point was formerly whether, when a company had issued a series of debentures ranking *pari passu*, and had not by the conditions of issue reserved to itself the power to pay off some of these whilst leaving the others unpaid, it was entitled to pay off any part of the issue without at the same time paying off the remainder, since all the holders of the series of debentures ranked alike.

Section 104 (see p. 108) has removed these difficulties, for whilst it seems clearly to recognize the power of a company to redeem part only of a series, it permits a company on the redemption of any debentures to keep them alive for the purpose of re-issue, and to re-issue the same or to issue substituted debentures, which debentures, whether re-issued or substituted, are to have the same rights and priorities as the original debentures.

The effect of the section, which is printed in full at page 108, may be stated as follows—

1. A company which has at any time, either before or after the passing of the Act, redeemed any debentures previously issued, may keep them alive for the purpose of re-issue, and may re-issue the same debentures, or issue other debentures in their place; and debentures so re-issued, or debentures issued in their place, are not to lose their former rights or priorities.

2. This may not be done—

(*a*) Where the articles of the company or the conditions of issue expressly provide otherwise.

(*b*) Where the debentures have been redeemed in pursuance of any obligation on the company to redeem them, other than an obligation enforceable only by the original holder of the debentures or his assigns. Thus, if the debentures have been redeemed by the company in pursuance of an obligation enforceable only by the holder, they may be re-issued.

3. Past re-issues, even if made before the passing of the Act, are validated, but the results of cases decided before 7th March, 1907, are not interfered with. Instances of such cases are the decisions cited above on page 70.

4. Redeemed debentures may be kept alive by transfer to a nominee, and transfer from the nominee constitutes such a re-issue as is permitted by the section.

5. Debentures deposited to secure advances on current account or otherwise are not redeemed by the disappearance of the debit. They will constitute security for fresh advances.

6. The re-issue of a redeemed debenture, or the issue of a substituted debenture, is treated as the

issue of a new debenture for the purposes of stamp duty. Thus the revenue is protected.

7. Such issue or re-issue is not to be treated as the issue of a new debenture for the purpose of any provision limiting the amount or number of debentures to be issued.

8. The holder of a debenture, issued or re-issued as permitted by the section, which appears to be, but is not, properly stamped, may use the debenture in evidence in a debenture holder's action, without payment of the unpaid duty or any penalty, unless he knew or ought to have known of the defect. The liability for the unpaid duty and penalty falls on the company.

Accordingly there is now nothing (apart from the articles of association, or the conditions of issue) to prevent any debentures redeemed by a company, and not within the statutory exceptions, being kept alive and re-issued as occasion may require, the amount of the loan available on what may be the best security the company can offer thus remaining undiminished, whilst at the same time it is possible to lessen the indebtedness of the company without prejudicing future borrowings. The practice of a company, on redeeming debentures, taking a transfer to its own nominee is common, convenient and simple, and has much to recommend it.

CHAPTER VIII

REMEDIES OF DEBENTURE HOLDERS: RECEIVERS

THE possible remedies which an aggrieved debenture holder may have against the company whose debentures he holds are somewhat numerous. It is not, however, proposed to deal here with all these remedies, but only with those which are open to him when the company is in default in any of its obligations under the debenture itself, or under the trust deed whereby his security is fortified.

Between a debenture holder and the company there exists a contract, and between the trustees of a trust deed and the company there also exists a contract, the agreement on the part of the company being in both cases an agreement under seal. Between a debenture stock holder and the company on the other hand there is in general no direct contract, the contract being between the company and the trustees (*Dunderland Iron Ore Company*, 1909, 1 Ch. 446).

Both debenture holders and debenture stock holders, however, may have remedies arising out of the issue of the debentures or debenture stock, which they have taken. These remedies are such as are available to persons who have agreed to take shares of a company, or indeed, as regards some of them, to any person who has entered into a contract with another. In the case of debenture holders or debenture stock holders, these may take the form, whether or not the debentures or debenture stock have been taken on the faith of a prospectus, of actions to rescind

the contract on the ground of misrepresentation inducing it, or actions of deceit, *i.e.*, for damages for fraudulent representations inducing it. Where the debentures or debenture stock have been taken on the faith of a prospectus, actions may also lie under section 84 of the Companies (Consolidation) Act, 1908 (formerly the Directors' Liability Act; see p. 97) or under section 81 of the Act (see p. 94), where there has been a breach of any of the statutory provisions of the section as to disclosure in a prospectus. These remedies, not being peculiar to debenture holders or debenture stock holders, need not here be discussed. It is rather the remedies available on failure of the company to observe the terms and conditions of the issue that require to be dealt with.

As regards unsecured or naked debentures, the remedies of the holder have already been mentioned (see p. 14).

Secured Debentures.

As has already been pointed out (see p. 10), the security to the benefit of which debenture holders are entitled may be a charge contained in the debentures themselves, or a charge contained in a trust deed securing the debentures, or there may be a charge both in the debentures themselves and in a trust deed securing them. In the absence of a trust deed, the remedies of a debenture holder are exercisable by himself, and, having a charge, he has, subject to the conditions of the debenture, all the remedies of a mortgagee. Where there is a trust deed containing a charge, the trustees have, subject to the conditions of the trust deed, all the remedies of a mortgagee. But where the debentures, as well as the trust deed, contain a charge, there is nothing to prevent the

debenture holder acting for himself, so far as he is able, without the trustees.

The principal remedies available to secured debenture holders divide themselves into two main classes, namely (1) remedies which are exercisable without the assistance of the Court, and (2) remedies which require the assistance of the Court.

Of the first class are—

(*a*) The exercise of the power of appointing a receiver.

(*b*) The exercise of the power of sale.

Of the second class are—

(*a*) Actions to enforce the security, which may involve the appointment by the Court of a receiver, or of a receiver or manager, or an order for foreclosure or sale of the mortgaged property.

(*b*) Actions on the covenant to pay principal and interest.

(*c*) The presentation of a winding-up petition.

The Power of Appointing a Receiver.

The Conveyancing and Law of Property Act, 1881, by section 19, confers upon mortgagees, in cases where the mortgage deed was executed on or after 1st January, 1882, a power to sell the mortgaged property when the mortgage money has become due, subject to the provisions of the Act. It has been held that this power given to mortgagees does not extend to debenture holders (*Blaker* v. *Herts and Essex Waterworks*, 1889, 41 Ch.D. 399), and accordingly that debenture holders have no implied power of sale. The same section gives to mortgagees, when the mortgage money has become due, the power to appoint a receiver. It follows that, on the basis of

the decision just cited, debenture holders have no implied power of appointing a receiver. This decision has been adversely criticized on very substantial grounds, but it would, in the face of it, be unsafe to rely upon the section as conferring upon debenture holders either a power of sale or a power of appointing a receiver.

It has therefore become customary, except where it is not desired that debenture holders should have such power, to incorporate in the debentures an express power to appoint a receiver and to give such receiver a power of sale.

A specimen of such a power, embodied in one of the conditions of a debenture will be found on page 32. It will be observed that the condition there set out, after empowering the receiver to take possession of the mortgaged property, to sell, to carry on the business and to compromise, proceeds, as is frequently the case, to incorporate sections 19 to 24 of the Conveyancing Act, 1881, as varied and extended by the provisions of the condition. Similarly, the clause, almost invariably occurring in a trust deed, giving to the trustees the power of appointing a receiver, frequently incorporates the provisions of those sections, extending and varying them by reference to the terms of the clause. These sections, which in such cases are of great importance, are printed in full in Appendix D (see p. 135).

The appointment of a receiver, where the power exists, is often the first step taken by a debenture holder, or by the trustees of a trust deed, towards enforcing the security. It need hardly be said that great care must be taken, before the exercise of the power, to see that an occasion has arisen upon which the power may be exercised.

The proportion of debenture holders required by the condition in the debentures must consent in making the appointment. If a single debenture holder, with the consent in writing of (say) a majority of the holders of the outstanding debentures of the series, may appoint, he should sign the appointment, and the necessary number of the other debenture holders should append their signatures to a form of consent to the appointment at the foot of the document. In general the trustees of a trust deed may appoint without the concurrence of any of the debenture holders.

The appointment of a receiver will become effective when notice is served on the company.

By section 94 of the Companies (Consolidation) Act, 1908 (see p. 104), any person who appoints a receiver or manager of the property of a company under any powers contained in any instrument, must within seven days of the appointment give notice of the fact to the Registrar of Companies and pay the prescribed fee. The Registrar must then enter the fact in the register of mortgages and charges. Penalties are prescribed for default in thus notifying the appointment, which, it is to be observed, is the duty not of the receiver but of the person or persons appointing him. The registration of the fact of the appointment of a receiver is a valuable safeguard to persons having dealings with the company.

Position of a Receiver Appointed by Debenture Holders.

A receiver appointed by debenture holders, or by the trustees of a trust deed, is in reality an agent. Whether he is the agent of the persons appointing him, or the agent of the company, must be determined

by the provisions of the power under which he is appointed. It is common for it to be expressly provided that he is to be the agent of the company, and that the company is alone to be responsible for his acts or defaults. And if he is declared to be the agent of the company, he incurs no personal liability for his acts (*Owen* v. *Cronk*, 1895, 1 Q.B. 265). He may, however, either by the express terms of the provisions whereunder he is appointed, or on the general construction of those provisions, be the agent of the debenture holders or of the trustees, as the case may be. Section 24 (2) of the Conveyancing Act, 1881, provides that a receiver appointed under the Act is to be deemed the agent of the mortgagor, *i.e.*, of the company. But, in spite of the fact that the provisions of sections 19 to 24 may be incorporated, if there is no express provision in the clause under which a receiver is appointed to the effect that he is to be the agent of the company, the construction placed by the Court upon that clause may be that he is the agent of the debenture holders, or of their trustees, as the case may be; for the powers of a receiver so appointed generally go far beyond the powers which a receiver has under section 24 of the Conveyancing Act (see In re *Vimbos*, 1900, 1 Ch. 470; *Robinson Printing Company* v. *Chic*, 1905, 2 Ch. 123; *Deyes* v. *Wood*, 1911, 1 K.B. 806).

Where a receiver is appointed and is the agent of the company, and the company subsequently goes into liquidation, he ceases to be the agent of the company, but he does not become the agent of the debenture holders or their trustees, unless they in fact confer upon him any authority to act on their behalf (*Gosling* v. *Gaskell*, 1897, A.C. 575). The question as to whether, on a liquidation supervening,

such a receiver becomes personally liable in respect of his acts and contracts was left undecided in the case just cited. It would appear, however, that he does become personally liable, since the dissenting judgment of Rigby, L.J., in the Court of Appeal, the decision of which Court was reversed by the House of Lords, was expressly approved by several of the Lords, and in that judgment there are very strong indications that the view of Rigby, L.J., was that the receiver, after liquidation, became personally liable (see *Gaskell* v. *Gosling*, 1896, 1 Q.B. at p. 700).

Where a receiver is appointed by debenture holders or their trustees, the Court will not, when a liquidation supervenes, appoint the liquidator in his place, but will order the liquidator to give up possession of the mortgaged property to the receiver (In re *Pound Son and Hutchins*, 1889, 42 Ch. Div. 402).

The position of a receiver appointed by the Court differs widely from that of a receiver appointed by debenture holders, as will be seen hereafter (p. 85).

Duties of a Receiver Appointed by Debenture Holders.

There are certain statutory duties which a receiver who has been appointed under the powers contained in any instrument is bound to perform. As has been stated above, the fact of his appointment should have been registered by the person or persons appointing him within seven days of the appointment. He himself, by section 95 of the Act (see p. 105), must, if he has taken possession, (1) once in every half-year while he remains in possession file with the Registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates; (2) on ceasing to act, file a similar abstract; (3) on ceasing to act, file with the Registrar notice

to that effect. This notice must be entered by the Registrar in the register of mortgages and charges. Receivers who fail to comply with these provisions are liable to penalties.

A form of Abstract of Receipts and Payments by Receiver or Manager will be found at page 125 (Appendix A, Form No. 5). A form of Notice by Receiver or Manager on ceasing to act will be found at p. 126 (Appendix A, Form No. 6).

A further duty is prescribed by section 107 of the Act (see p. 110), which provides that where a receiver is appointed on behalf of the holders of debentures secured by a floating charge, or possession is taken by them or on their behalf of any property comprised in or subject to the charge, then, unless a winding-up is in progress, the debts, which in a winding-up are entitled to preferential payment under section 209 of the Act (see p. 113), are to be paid forthwith out of assets coming to the hands of the receiver or person taking possession, in priority to any principal or interest due on the debentures. The benefit of a floating charge is thus by statute postponed to certain debts, which must be paid by the receiver as soon as he has assets.

The date from which the debts entitled to preferential payment are to be reckoned for the purposes of section 107 is the date of the appointment of the receiver, or of possession being taken. These debts are thus enumerated in section 209 of the Act—

(*a*) All parochial or other local rates due from the company at the date . . , and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment;

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds; and

(c) All wages of any workman or labourer not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the company during two months before the said date: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the said date; and

(d) . . . all amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the said date, subject nevertheless to the provisions of section five of that Act.

The foregoing debts shall—

(a) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) In the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge.

The National Insurance Act, 1911, by section 110, adds to the list of debts entitled to priority in a winding-up contributions payable under that Act by a company in respect of employed contributors or workmen in an insured trade during the four months before the date of the winding-up. It would seem, however, that since the priority is there given "in the distribution of the assets of a company being wound up," these contributions do not take priority over the claims of debenture holders where there is no winding-up, and accordingly that they are not included in the debts which a receiver is bound to pay under section 107 of the Companies (Consolidation) Act, 1908; but the matter is not free from doubt.

Apart from the above statutory duties, the duties of a receiver depend upon the terms of his

appointment. As has been already pointed out (p. 77), he is in general authorized to do a great deal more than a receiver whose statutory powers are defined by section 24 of the Conveyancing Act, 1881, who has "power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise . . . and to give effectual receipts . . . for the same." This is the primary power of any receiver, and he will therefore (unless the persons appointing him have already done so) give notice to persons from whom money is or may be due to pay it to him.

By the terms of his appointment he generally has power to take possession of all or any of the property charged, to carry on the business, to sell and to compromise. In practice he will enter into possession, carry on the business, collect the income and, if necessary, sell all or any of the assets. Out of the proceeds he will pay all necessary outgoings of the business, including interest on any charges having priority, retain his remuneration and pay to the debenture holders *pari passu* interest due to them. In the event of a sale with the view of paying off the principal, any surplus will, of course, be handed to the company, as well as any surplus income if there is no sale.

As regards the power of sale, this may be, and frequently is, vested in the receiver, but sometimes the trustees of a trust deed are themselves empowered to sell in certain specified events on which the security becomes enforceable.

A receiver may not carry on the business of the company, unless he is expressly empowered to do so. If he is so empowered, he may do everything that is reasonably necessary for the purpose, such as

buying and selling goods, employing labour, and even borrowing.

Actions to Enforce the Security.

Of the remedies open to debenture holders, and to debenture stock holders acting through their trustees, the commonest is an action to enforce the security, commonly called a debenture holders' action. Frequently the primary object of such an action is to obtain the appointment by the Court of a receiver and manager. The plaintiffs are one or more debenture holders, suing on behalf of themselves and all other the holders of the debentures of the series, and the company is defendant. The writ in this type of action claims (1) a declaration of charge, (2) accounts and enquiries, (3) payment, (4) foreclosure or sale, and (5) a receiver and manager. It would be beyond the scope of this book to deal with all the steps in such an action, when the claim is fully pressed, and a judgment is obtained and duly worked out. Debenture holders' actions are always brought in the Chancery Division of the High Court.

Receiver Appointed by the Court.

In general, the first and most important step taken, after the action is launched, is to apply by motion to the Court for the appointment of a receiver, and usually also a manager, if the business of the company is a going concern.

The Court will appoint a receiver, and, if necessary, also a manager, when the company is in default in the payment of principal and interest. It will also do so, if it is satisfied by evidence that the security is in jeopardy, or if a winding-up has commenced or is threatened.

If the company is in liquidation, the receiver appointed by the Court may be the official receiver (sec. 162 of the Act; see p. 112).

The effect of the appointment of a receiver by the Court is that the Court assumes the protection of the property which constitutes the security, and holds it for the benefit of the debenture holders interested; and if a manager is also appointed, the management of the property is management by the Court. Such a receiver is an officer of the Court, and any interference with his possession is a contempt of Court.

It follows that his position is wholly different from that of a receiver appointed by debenture holders (see p. 78). "He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him however much they may disapprove of the mode in which he is carrying on the business. Only the Court can dismiss him or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly. . . . It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the Court clearly cannot be liable. Therefore any orders which he may give . . . must prima facie be orders given on his own responsibility and credit" (per Esher, M.R., in *Burt* v. *Bull*, 1895, 1 Q.B. at p. 279). But, though personally liable, he has a right of indemnity against the assets in respect of liabilities properly incurred, in priority to all other claims (*Strapp* v. *Bull*, 1895, 2 Ch. 1; and see *Glasdir Copper Mines*, 1906, 1 Ch. 365; In re *Boynton*, 1910, 1 Ch. 519).

A receiver appointed by the Court must give security duly to account for what he shall receive, and he is allowed a proper salary or allowance.

A manager is in general only appointed if it is necessary, in order to secure the sale of the business, that the business should be kept going. Accordingly, a manager is usually appointed for a fixed period only, generally three months, and if it be desired to continue his appointment a further order is necessary. Where a manager is required, the same person is usually appointed both receiver and manager.

By section 94 of the Act (see p. 104), the fact of the appointment of a receiver must be notified to the Registrar by the person obtaining the order within seven days from the date of the order.

Duties of Receiver Appointed by the Court.

The order whereby a receiver is appointed contains a direction to him to pay forthwith out of any assets coming to his hands the preferential debts specified on page 81. It also provides for his passing his accounts, as a rule, at intervals of six months. The details of this procedure are provided for by Order 50, Rules 18 to 22, of the Rules of the Supreme Court.

His chief duties, apart from the above, are to take possession of the property charged, to receive the rents, to collect debts, to let land and houses, and generally to act as owner. If he be manager also, he will take all necessary steps to carry on the business, pending a favourable opportunity for a sale.

It is frequently desirable, or even necessary, for a receiver and manager to obtain the directions of the Court. Speaking generally, the sanction of the Court is necessary to any act involving expense to the property, or any drastic step. The application is

made by the plaintiffs in the debenture holders' action. Examples of cases where the Court will be asked to sanction action by the receiver are where a sale is contemplated, where it is desired to commence proceedings to enforce a claim, or where it is expedient to borrow.

It is to be observed that the appointment of a receiver and manager operates as a dismissal of the employees of the company (*Reid* v. *Explosives Company*, 1887, 19 Q.B.D. 264).

Other Remedies by Action.

Whilst the procedure by debenture holders' action is the most effective remedy open to debenture holders, since the peculiar advantages of the security are relied on, other forms of legal proceedings are also open to them to which it may occasionally be desirable to have recourse. If the security is inadequate, it may be more effective to sue on the covenant for payment of principal or interest or both, and after judgment to issue execution. Or an unpaid debenture holder can, if he pleases, present a petition for winding-up the company, and then prove in the winding-up. But these remedies are unlikely to be resorted to, when the far more effective remedy of enforcing the security by action is available.

CHAPTER IX

STATUTORY PROVISIONS

In this chapter are reproduced, for convenience of reference, the portions of the Companies (Consolidation) Act, 1908 (8 Edw. VII, c. 69), relating to, or containing references to debentures, debenture stock, borrowing powers, mortgages and charges, and receivers or managers. Where the subject matter of a particular section has already been discussed or referred to, references are given to the preceding pages where the topic is dealt with. Notes are added to the sections where the subject seems to demand it.

It has not been thought necessary in most cases to reproduce the sections of Part II of the Act (which deals with winding-up), in which creditors are mentioned. A debenture holder is, of course, a creditor, and in the vast majority of cases a secured creditor. But it is comparatively seldom that, where a company is being wound up, a debenture holder has not previously taken steps to enforce his security by the appointment of a receiver, and accordingly he has in general little direct concern in the liquidation.

Neither has it been thought necessary to set out sections 49, 50, 53 and 54 of the Act, in which the rights of creditors in certain cases of reduction of capital are dealt with.

Alteration of Objects of Company.

9.—(1) Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

(a) to carry on its business more economically or more efficiently; or

(*b*) to attain its main purpose by new or improved means; or

(*c*) to enlarge or change the local area of its operations; or

(*d*) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(*e*) to restrict or abandon any of the objects specified in the memorandum.

(2) The alteration shall not take effect until and except in so far as it is confirmed on petition by the court.

(3) Before confirming the alteration the court must be satisfied—

(*a*) that sufficient notice has been given to every holder of *debentures* of the company, and to any persons or class of persons whose interests will, in the opinion of the court, be affected by the alteration; and

(*b*) that, with respect to every creditor who in the opinion of the court is entitled to object, and who signifies his objection in manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the court:

Provided that the court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

(4) The court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(5) The court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase.

(6) An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the registrar of companies, and he shall register the same, and shall certify the registration

under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

The court may by order at any time extend the time for the delivery of documents to the registrar under this section for such period as the court may think proper.

(7) If a company makes default in delivering to the registrar of companies any document required by this section to be delivered to him, the company shall be liable to a fine not exceeding ten pounds for every day during which it is in default.

The above section in effect provides as regards debenture holders that, on application to the Court by a company to confirm an alteration in its memorandum of association (see p. 19), they are entitled to notice of the proposed alteration, and may appear and object.

Annual List of Members and Summary.

26.—(1) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars—

(*a*) the amount of the share capital of the company, and the number of the shares into which it is divided;

(*b*) the number of shares taken from the commencement of the company up to the date of the return;

(*c*) the amount called up on each share;

(*d*) the total amount of calls received;

(*e*) the total amount of calls unpaid;

(*f*) the total amount of the sums (if any) paid by way of commission in respect of any shares or *debentures*, or allowed by way of discount in respect of any *debentures*, since the date of the last return;

(*g*) the total number of shares forfeited;

(*h*) the total amount of shares or stock for which share warrants are outstanding at the date of the return;

(*i*) the total amount of share warrants issued and surrendered respectively since the date of the last return;

(*k*) the number of shares or amount of stock comprised in each share warrant;

(*l*) the names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called; and

(*m*) the total amount of debt due from the company in respect of all *mortgages and charges* which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July nineteen hundred and eight.

(3) The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss.

(4) The above list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by the manager or by the secretary of the company.

(5) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

As to the issue of debentures at a discount, see page 15.

As to the mortgages and charges required to be registered with the Registrar of Companies, see pages 60 to 60.

First Statutory Meeting of Company.

65.—(1) Every company limited by shares and registered on or after the first day of January nineteen hundred and one shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting.

(2) The directors shall, at least seven days before the day on which the meeting is held, forward a report (in this Act called "the statutory report") to every member of the company and to every other person entitled under this Act to receive it.

(3) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

(*a*) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(*b*) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;

(*c*) an abstract of the receipts of the company on account of its capital, whether from shares or *debentures*, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and *debentures* and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company;

(*d*) the names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company; and

(*e*) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval

together with the particulars of the modification or proposed modification.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors, if any, of the company.

(5) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar of companies forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the court in manner provided by Part IV of this Act for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company.

By the above section, the abstract of receipts and payments, which must be embodied in the statutory report, must include under a distinctive heading the receipts of the company on capital account from debentures.

Specific Requirements as to Particulars of Prospectus.

81.—(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state—

(*a*) the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

(*b*) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(*c*) the names, descriptions, and addresses of the directors or proposed directors; and

(*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and

(*e*) the number and amount of shares and *debentures* which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or *debentures* have been issued or are proposed or intended to be issued; and

(*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or *debentures*, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and

(*g*) the amount (if any) paid or payable as purchase money in cash, shares, or *debentures*, for any such property

as aforesaid, specifying the amount (if any) payable for goodwill; and

(*h*) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or *debentures* of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(*i*) the amount or estimated amount of preliminary expenses; and

(*j*) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(*k*) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and

(*l*) the names and addresses of the auditors (if any) of the company; and

(*m*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(*n*) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(*a*) the purchase money is not fully paid at the date of issue of the prospectus; or

(*b*) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(*c*) the contract depends for its validity or fulfilment on the result of that issue.

(3) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4) Any condition requiring or binding any applicant for shares or *debentures* to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(*a*) as regards any matter not disclosed, he was not cognisant thereof; or

(*b*) the non-compliance arose from an honest mistake of fact on his part:

Provided that in the event of non-compliance with the requirements contained in paragraph (*m*) of subsection (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7) This section shall not apply to a circular or notice inviting existing members or *debenture holders* of a company to subscribe either for shares or for *debentures* of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued

more than one year after the date at which the company is entitled to commence business.

(9) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

(*See* pp. 16 and 75.)

Obligations of Companies where no Prospectus is Issued.

82.—(1) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or *debentures* unless before the first allotment of either shares or *debentures* there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2) This section shall not apply to a private company or to a company which has allotted any shares or *debentures* before the first day of July nineteen hundred and eight.

(*See* p. 16.)

84.—(1) Where a prospectus invites persons to subscribe for shares in or *debentures* of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorized the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or *debentures* on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(*a*) with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or *debentures*, as the case may be, believe, that the statement was true; and

(*b*) with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or

valuation. Provided that the director, person named as director, promoter, or person who authorized the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

(*c*) with respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy or extract from the document:

or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(iii) that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing on the eighteenth day of August one thousand eight hundred and ninety, has issued shares or *debentures*, and for the purpose of obtaining further capital by subscriptions for shares or *debentures* issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorized the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(4) Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorized the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

The expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company:

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

(*See* p. 75.)

85.—(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

(*a*) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(*b*) if no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash,

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

This subsection shall not apply to a private company or to a company which has allotted any shares or *debentures* before the first day of July nineteen hundred and eight.

Restrictions on Commencement of Business.

87.—(1) A company shall not commence any business or exercise any *borrowing powers* unless—

(*a*) shares held subject to the payment of the whole

amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(*b*) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and

(*c*) there has been filed with the registrar of companies a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and

(*d*) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar of companies a statement in lieu of prospectus.

(2) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and *debentures* or the receipt of any money payable on application for *debentures*.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the first day of January nineteen hundred and one, or to a company registered before the first day of July nineteen hundred and eight which does not issue a prospectus inviting the public to subscribe for its shares.

(*See* p. 26.)

Statement in Balance Sheet as to Commissions and Discounts.

90.—Where a company has paid any sums by way of commission in respect of any shares or *debentures*, or allowed any sums by way of discount in respect of any *debentures*, the total amount so paid or allowed, or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off.

(*See* p. 16.)

Limitation of Time for Issue of Certificates.

92.—(1) Every company shall, within two months after the allotment of any of its shares, *debentures*, or *debenture stock*, and within two months after the registration of the transfer of any such shares, *debentures*, or *debenture stock*, complete and have ready for delivery the certificates of all shares, the *debentures*, and the certificates of all *debenture stock* allotted or transferred, unless the conditions of issue of the shares, *debentures*, or *debenture stock* otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every director, manager, secretary, and other officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(*See* p. 27.)

Registration of Mortgages and Charges in England and Ireland.

93.—(1) Every *mortgage* or *charge* created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

(*a*) a *mortgage* or *charge* for the purpose of securing any issue of *debentures*; or

(*b*) a *mortgage* or *charge* on uncalled share capital of the company; or

(*c*) a *mortgage* or *charge* created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) a *mortgage* or *charge* on any land, wherever situate, or any interest therein; or

(*e*) a *mortgage* or *charge* on any book debts of the company; or

(*f*) a *floating charge* on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed

particulars of the *mortgage* or *charge*, together with the instrument (if any) by which the *mortgage* or *charge* is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a *mortgage* or *charge* becomes void under this section the money secured thereby shall immediately become payable:

Provided that—

(i) in the case of a *mortgage* or *charge* created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy of the instrument by which the *mortgage* or *charge* is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the *mortgage* or *charge*, as the time within which the particulars and instrument or copy are to be delivered to the registrar; and

(ii) where the *mortgage* or *charge* is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the *mortgage* or *charge* may be sent for registration notwithstanding that further proceedings may be necessary to make the *mortgage* or *charge* valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a *mortgage* or *charge* on those book debts; and

(iv) the holding of *debentures* entitling the holder to a *charge* on land shall not be deemed to be an interest in land.

(*See* pp. 60, 62, and 65.)

(2) The registrar shall keep, with respect to each company, a register in the prescribed form of all the *mortgages* and *charges* created by the company after the first day of July nineteen hundred and eight and requiring registration under this

section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such *mortgage* or *charge*, the date of creation, the amount secured by it, short particulars of the property *mortgaged* or *charged*, and the names of the *mortgagees* or persons entitled to the *charge*.

(*See* p. 59.)

(3) Where a *series of debentures* containing, or giving by reference to any other instrument, any *charge* to the benefit of which the *debenture holders* of that series are entitled *pari passu* is created by a company, it shall be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the *charge* or, if there is no such deed, after the execution of any *debentures* of the series, the following particulars—

(*a*) the total amount secured by the whole series; and

(*b*) the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and

(*c*) a general description of the property *charged;* and

(*d*) the names of the trustees, if any, for the *debenture holders;*

together with the deed containing the *charge*, or, if there is no such deed, one of the *debentures* of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of *debentures* in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the *debentures* issued.

(*See* pp. 64 and 67.)

(4) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any *debentures* of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such *debentures*, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the *debentures* issued:

Provided that the deposit of any *debentures* as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the *debentures* at a discount.

(*See* pp. 16, 65 and 67.)

(5) The registrar shall give a certificate under his hand of the registration of any *mortgage* or *charge* registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(*See* p. 66.)

(6) The company shall cause a copy of every certificate of registration given under this section to be endorsed on every *debenture* or certificate of *debenture stock* which is issued by the company, and the payment of which is secured by the *mortgage* or *charge* so registered:

(*See* p. 66.)

Provided that nothing in this subsection shall be construed as requiring a company to cause a certificate of registration of any *mortgage* or *charge* so given to be endorsed on any *debenture* or certificate of *debenture stock* which has been issued by the company before the *mortgage* or *charge* was created.

(*See* p. 66.)

(7) It shall be the duty of the company to send to the registrar for registration the particulars of every *mortgage* or *charge* created by the company and of the issues of *debentures* of a series, requiring registration under this section, but registration of any such *mortgage* or *charge* may be effected on the application of any person interested therein.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(*See* p. 66.)

(8) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

(*See* p. 63.)

(9) Every company shall cause a copy of every instrument creating any *mortgage* or *charge* requiring registration under this section to be kept at the registered office of the company: Provided that, in the case of a *series of* uniform *debentures*, a copy of one such *debenture* shall be sufficient.

(*See* p. 58.)

Registration of Enforcement of Security.

94.—(1) If any person obtains an order for the appointment of a *receiver* or *manager* of the property of a company, or appoints such a *receiver* or *manager* under any powers

contained in any instrument, he shall within seven days from the date of the order or of the appointment under the powers contained in the instrument give notice of the fact to the registrar of companies, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of *mortgages* and *charges*.

(2) If any person makes default in complying with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(*See* pp. 78 and 104.)

Filing of Accounts of Receivers and Managers.

95.—(1) Every *receiver* or *manager* of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half-year while he remains in possession, and also on ceasing to act as *receiver* or *manager*, file with the registrar of companies an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as *receiver* or *manager* file with the registrar notice to that effect, and the registrar shall enter the notice in the register of *mortgages* and *charges*.

(2) Every *receiver* or *manager* who makes default in complying with the provisions of this section shall be liable to a fine not exceeding fifty pounds.

(*See* p. 105.)

Rectification of Register of Mortgages.

96.—A judge of the High Court, on being satisfied that the omission to register a *mortgage* or *charge* within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such *mortgage* or *charge* was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified.

(*See* p. 67.)

Entry of Satisfaction.

97.—The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered

mortgage or *charge* was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

(*See* p. 68.)

Index to Register of Mortgages and Charges.

98.—The registrar of companies shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the *mortgages* or *charges* registered with him under this Act.

Penalties.

99.—(1) If any company makes default in sending to the registrar of companies for registration the particulars of any *mortgage* or *charge* created by the company, and of the issues of *debentures of a series*, requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any *mortgage* or *charge* created by the company, the company and every director, manager, and other officer of the company, who knowingly and wilfully authorized or permitted the default shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

(3) If any person knowingly and wilfully authorizes or permits the delivery of any *debenture* or certificate of *debenture stock* requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

(*See* p. 67.)

Company's Register of Mortgages.

100.—(1) Every limited company shall keep a register of *mortgages* and enter therein all *mortgages* and *charges* specifically affecting property of the company, giving in each case a short description of the property *mortgaged* or *charged*, the amount

of the *mortgage* or *charge*, and (except in the case of securities to bearer) the names of the *mortgagees* or persons entitled thereto.

(2) If any director, manager, or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

(*See* p. 58.)

Right to Inspect Copies of Instruments creating Mortgages and Charges and Company's Register of Mortgages

101.—(1) The copies of instruments creating any *mortgage* or *charge* requiring registration under this Act with the registrar of companies, and the register of *mortgages* kept in pursuance of the last foregoing section, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of *mortgages* shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorizing or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues; and, in addition to the above penalty as respects companies registered in England or Ireland, any judge of the High Court sitting in chambers, or the judge of the court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the copies or register.

(*See* p. 59.)

Right of Debenture Holders to Inspect the Register of Debenture Holders and to have Copies of Trust Deed.

102.—(1) Every register of holders of *debentures* of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such *debentures*, and of any holder of shares in the company but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may

require a copy of the register or any part thereof on payment of sixpence for every one hundred words required to be copied.

(2) A copy of any *trust deed* for securing any issue of *debentures* shall be forwarded to every holder of any such *debentures* at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company, or, where the *trust deed* has not been printed, on payment of sixpence for every one hundred words required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding five pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director, manager, secretary, or other officer of the company who knowingly authorizes or permits the refusal shall incur the like penalty.

(*See* p. 35.)

Perpetual Debentures.

103.—A condition contained in any *debentures* or in any deed for securing any *debentures*, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the *debentures* are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

(*See* p. 15.)

Power to re-issue Redeemed Debentures in Certain Cases.

104.—(1) Where either before or after the passing of this Act a company has redeemed any *debentures* previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the *debentures* have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed *debentures* were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the *debentures* alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the *debentures* either by re-issuing the same *debentures* or by issuing other *debentures* in their place, and upon such a re-issue the person entitled to the *debentures* shall have, and shall be deemed always to have had, the same rights and priorities as if the *debentures* had not previously been issued.

(2) Where with the object of keeping *debentures* alive for the purpose of re-issue they have either before or after the passing of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has either before or after the passing of this Act deposited any of its *debentures* to secure advances from time to time on current account or otherwise, the *debentures* shall not be deemed to have been redeemed by reason only of the account of the Company having ceased to be in debit whilst the *debentures* remained so deposited.

(4) The re-issue of a *debenture* or the issue of another *debenture* in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new *debenture* for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of *debentures* to be issued :

Provided that any person lending money on the security of a *debenture* reissued under this section which appears to be duly stamped may give the *debenture* in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the *debenture* was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(5) Nothing in this section shall prejudice—

(*a*) the operation of any judgment or order of a court of competent jurisdiction pronounced or made before the seventh day of March nineteen hundred and seven as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed ; or

(*b*) any power to issue *debentures* in the place of any *debentures* paid off or otherwise satisfied or extinguished reserved to a company by its *debentures* or the securities for the same.

(*See* pp. 70 to 73.)

Specific Performance of Contract to Subscribe for Debentures.

105.—A contract with a company to take up and pay for any *debentures* of the company may be enforced by an order for specific performance.

Validity of Debentures to Bearer in Scotland.

106.—Notwithstanding anything contained in the statute of the Scots Parliament of 1696, chapter twenty-five, *debentures* to bearer issued in Scotland are declared to be valid and binding according to their terms.

The effect of this Act, which is entitled "Act anent Blank Bonds and Trusts," is to invalidate all deeds issued with the name of their creditor in blank.

Payments of Certain Debts out of Assets subject to Floating Charge in Priority to Claims under the Charge.

107.—(1) Where, in the case of a company registered in England or Ireland, either a *receiver* is appointed on behalf of the *holders of* any *debentures* of the company secured by a *floating charge*, or possession is taken by or on behalf of those *debenture holders* of any property comprised in or subject to the *charge* then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part IV of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the *receiver* or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the *debentures*.

(2) The periods of time mentioned in the said provisions of Part IV of this Act shall be reckoned from the date of the appointment of the *receiver* or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

(*See* pp. 45 and 81.)

Rights of Preference Shareholders, etc., as to Receipt and Inspection of Reports, etc.

114.—(1) Holders of preference shares and *debentures* of a company shall have the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the first day of July nineteen hundred and eight.

(*See* p. 8.)

Power to Compromise with Creditors and Members.

120.—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) In this section the expression "company" means any company liable to be wound up under this Act.

Under the provisions of this important section, all kinds of schemes of arrangement, many of them affecting debenture holders, have been sanctioned. For instance, debenture holders may, under such a scheme, accept shares in lieu of their debentures, or may allow their debentures to be postponed in favour of new debentures to be created. One of the salient features of the section is that it enables the statutory majority of a class to bind the minority. The similar power of a majority of debenture holders to bind the minority in matters affecting their rights, which power is generally expressly given in one of the schedules to a debenture trust deed, is dealt with on page 51. See also section 191 (p. 112).

Meaning of "Private Company."

121.—(1) For the purposes of this Act the expression "private company" means a company which by its articles—

(*a*) restricts the right to transfer its shares; and

(*b*) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

(*c*) prohibits any invitation to the public to subscribe for any shares or *debentures* of the company.

(2) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or *debentures* together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

The Companies Act, 1913, leaves unaltered the above prohibition relating to public issues of shares and debentures. Sections 82 (p. 97), 87 (p. 99), and 114 (p. 110), provide for certain privileges of private companies in respect of debentures and borrowing.

Power in England to Appoint Official Receiver as Receiver for Debenture Holders or Creditors.

162.—Where an application is made to the court to appoint a *receiver* on behalf of the *debenture holders* or other creditors of a company which is being wound up by the Court in England, the official receiver may be so appointed.

(*See* p. 85.)

Arrangement when Binding on Creditors.

191.—(1) Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors shall, subject to any right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three fourths in number and value of the creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the court against it, and the court may thereupon, as it thinks just, amend, vary, or confirm the arrangement.

See also section 120 (p. 111) and note thereto.

Application of Bankruptcy Rules in winding up of Insolvent English and Irish Companies.

207.—In the winding up of an insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

A debenture holder is generally a secured creditor. The effect of this section (which reproduces the provisions of section 10 of the Judicature Act, 1875), is to apply to secured and unsecured creditors in the winding up of an insolvent company the same rules as apply in bankruptcy. See also section 209 (below).

A secured creditor in the winding up of an insolvent company may do one of four things: (1) he may rely on his security and not prove at all; (2) he may realize his security and prove for the balance due to him; (3) he may surrender his security to the liquidator and prove for his whole debt; (4) he may assess the value of his security, and, after deducting the assessed value, prove for the balance of his debt (see Bankruptcy Act, 1914, Second Schedule, Rules 10 to 18).

Preferential Payments.

209.—(1) In a winding up there shall be paid in priority to all other debts—

(a) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment;

(*b*) all wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds; and

(*c*) all wages of any workman or labourer not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the company during two months before the said date: Provided that, where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the court may decide to be due under the contract, proportionate to the time of service up to the said date; and

(*d*) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the said date, subject nevertheless to the provisions of section five of that Act.

(2) The foregoing debts shall—

(*a*) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(*b*) in the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of *holders of debentures* under any *floating charge* created by the company, and be paid accordingly out of any property comprised in or subject to that *charge*.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that in respect of any money paid under any such *charge* the landlord or other person shall have the same rights or priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(*a*) in the case of a company ordered to be wound up

compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and

(b) in any other case, the date of the commencement of the winding up.

See page 81. To the debts entitled to priority under subsection (1) of the above section must be added, except in the case of companies wound up voluntarily merely for the purposes of reconstruction or amalgamation, contributions payable by the company under the National Insurance Act, 1911, in respect of employed contributors or workmen in an insured trade during the four months before the date of the commencement of the winding up or the winding-up order (National Insurance Act, 1911, section 110, subsections (1) and (3). Subsection (2) contains similar provisions as to companies within the stannaries, as to which see section 240 of the Companies (Consolidation) Act, 1908). See, however, page 82.

Fraudulent Preference.

210.—(1) Any conveyance, *mortgage*, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual.

(3) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents.

The giving of a debenture containing a charge may be a fraudulent preference within the meaning of this section.

Effect of Floating Charge.

212.—Where a company is being wound up, a *floating charge* on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the *charge* was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the *charge*, together with interest on that amount at the rate of five per cent. per annum.

(*See* p. 45.)

Requirements as to Companies Established Outside the United Kingdom.

274.—(1) Every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom shall within one month from the establishment of the place of business file with the registrar of companies—

(*a*) a certified copy of the charter, statutes, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(*b*) a list of the directors of the company;

(*c*) the names and addresses of some one or more persons resident in the United Kingdom authorized to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in the directors or in the names or addresses of any such persons as aforesaid, the company shall within the prescribed time file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar such a statement in the form of a balance sheet as would, if it were a company formed and registered under this Act and having a share capital, be required under this Act to be included in the annual summary.

(4) Every company to which this section applies, and which uses the word "Limited" as part of its name, shall—

(a) in every prospectus inviting subscriptions for shares or *debentures* in the United Kingdom state the country in which the company is incorporated; and

(b) conspicuously exhibit on every place where it carries on business in the United Kingdom the name of the company and the country in which the company is incorporated; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company.

(5) If any company to which this section applies fails to comply with any of the requirements of this section the company, and every officer or agent of the company, shall be liable to a fine not exceeding fifty pounds, or, in the case of a continuing offence, five pounds for every day during which the default continues.

(6) For the purposes of this section—

The expression "certified" means certified in the prescribed manner to be a true copy or a correct translation;

The expression "place of business" includes a share transfer or share registration office;

The expression "director" includes any person occupying the position of director, by whatever name called; and

The expression "prospectus" means any prospectus notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or *debentures* of the company.

(7) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five shillings or such smaller fee as may be prescribed.

The object of this section is to enforce publicity of the foreign origin of companies established outside the United Kingdom. but carrying on business at an office within it.

Interpretation.

285. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say) :—

* * * * * *

"*Debenture*" includes *debenture stock*;

* * * * * *

"Prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or *debentures* of a company.

* * * * * *

APPENDIX A

FORMS.

FORM No. 1

Particulars of Mortgage or Charge for Registration

Certificate No.

THE COMPANIES (CONSOLIDATION) ACT, 1908

PARTICULARS to be supplied to the Registrar pursuant to s. 93 of the Companies (Consolidation) Act, 1908, of a mortgage or charge created by the COMPANY LIMITED, and being—

*(*a*) A mortgage or charge for the purpose of securing any issue of debentures; or

(*b*) A mortgage or charge on uncalled capital of the Company; or

(*c*) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) A mortgage or charge on any land wherever situate or any interest therein; or

(*e*) A mortgage or charge on any book debts of the Company; or

(*f*) A floating charge on the undertaking or property of the Company.

Presented for filing by

* Strike out the sub-heads (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*), which do not apply.

[*See over*]

PARTICULARS OF A MORTGAGE OR CHARGE CREATED BY THE ______ COMPANY LIMITED.

(1) Date of the Instrument creating or evidencing the Mortgage or Charge and description thereof.[1]	(2) Amount secured by the Mortgage or Charge.	(3) Short particulars of the Property Mortgaged or Charged.	(4) Names (with Addresses and Descriptions) of the Mortgagees or Persons entitled to the charge.	(5) Amount or rate per cent. of the Commission Allowance or Discount (if any) paid or made either directly or indirectly by the Company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the Debentures included in this Return.

[*Signature*]

[*Designation of position in relation to the Company*]

[*Date.*]

Note.—The fees payable on registration of Mortgages and Charges are as follows—

Where the amount of the Mortgage or Charge does not exceed £200 .. 10s.
Ditto ditto exceeds £200 .. £1

[1] A description of the Instrument, *e.g.*, Trust Deed, Mortgage, Debenture, etc., as the case may be, should be given. As to delivery of the Instrument or, in certain cases a copy thereof, with these Particulars see sec. 93 (1) and Provisos (i) and (ii).

FORM No. 2

Particulars of Series of Debentures for Registration

Certificate No.

THE COMPANIES (CONSOLIDATION) ACT, 1908

PARTICULARS to be delivered to the Registrar pursuant to 93 (3) of the Companies (Consolidation) Act, 1908, relating to a series of Debentures containing, or giving by reference to any other instrument, any charge, to the benefit of which the debenture holders of the said series are entitled *pari passu*, created by the COMPANY LIMITED.

Note.—The Deed, if any, containing the charge must be delivered with these particulars to the Registrar within twenty-one days after the execution of such Deed; or, if there is no such Deed, one of the Debentures must be so delivered within twenty-one days after the execution of any Debentures of the series.

Presented for filing by

[*See over*]

PARTICULARS TO BE DELIVERED TO THE REGISTRAR PURSUANT TO S. 93 (3) OF THE COMPANIES (CONSOLIDATION) ACT 1908, OF A SERIES OF DEBENTURES CREATED BY THE

COMPANY, LIMITED.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Total Amount secured by the whole series.	Amount of the Present Issue of the series.	Dates of Resolutions authorizing the issue of the series.	Date of the Covering Deed (if any) by which the security is created or defined; or, if there is no such Deed, the date of the first execution of Debentures of the series.	General Description of the Property charged	Names of the Trustees (if any) for the Debenture Holders.	Amount or rate per cent. of the Commission, Allowance or Discount (if any) paid or made either directly or indirectly by the Company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the Debentures included in this Return.

[Signature]

[Designation of position in relation to the Company];

[Date]

FORM No. 3

Particulars of Series of Debentures, where more than one Issue

Certificate No.

THE COMPANIES (CONSOLIDATION) ACT, 1908

THE COMPANY LIMITED.

Statement of particulars as required by subsection 3 of section 93 of the Companies (Consolidation) Act, 1908, when more than one issue is made of Debentures in a series.

Presented for filing by

PARTICULARS OF AN ISSUE OF DEBENTURES MADE BY THE COMPANY LIMITED.

To be entered on the Register pursuant to s. 93 (3) *of the Companies (Consolidation) Act,* 1908.

(1) Date of Present Issue.	(2) Amount of Present Issue.	(3) Particulars as to the Amount or Rate per cent. of the commission, allowance, or discount (if any) paid, or made, either directly, or indirectly, by the Company, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the Debentures included in this Return.

[*Signature*]

[*Designation of position in relation to the Company*]

[*Date*]

FORM No. 4

Memorandum of Satisfaction of Mortgage or Charge Verified by Declaration

No. of Certificate.

THE COMPANIES (CONSOLIDATION) ACT, 1903

Declaration verifying Memorandum of Satisfaction of Mortgage or Charge to be entered on the Register pursuant to s. 97 of the Companies (Consolidation) Act, 1908.

THE COMPANY LIMITED

WE, of , a Director of the above-named Company, and , of , the Secretary of the above named Company, solemnly and sincerely declare that the particulars contained in the memorandum of satisfaction annexed hereto, and dated , are true to the best of our knowledge, information and belief.

And we make this solemn Declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act, 1835.

Declared at the day of , One thousand nine hundred and , before me,

A Commissioner for Oaths.

Memorandum of Satisfaction of Mortgage or Charge.

The Company Limited, hereby gives notice that the (*) dated the day of , One thousand nine hundred and , and created by the Company for securing the sum of £ , was satisfied to the extent of £ on the of , 19 .

In witness whereof the common seal of the Company was hereunto affixed the day of , One thousand nine hundred and , in the presence of

} *Directors.*

Secretary.

Presented for filing by

(*) Insert here "mortgage" or "charge," "debentures" or "debenture stock," as the case may be.

FORM No. 5

Receiver's or Manager's Abstract of Receipts and Payments

Certificate No.

THE COMPANIES (CONSOLIDATION) ACT, 1908

RECEIVER OR MANAGER'S ABSTRACT OF RECEIPTS AND PAYMENTS

(*Pursuant to s.* 95 *of the Companies* (*Consolidation*) *Act,* 1908.)

Name of Company LIMITED.

Name and Address of Receiver or Manager.

Date and description of instrument under which Receiver or Manager is appointed.

Date of taking possession

Period covered by the Abstract. From
To

Presented for filing by

ABSTRACT

RECEIPTS				PAYMENTS			
	£	*s.*	*d.*		*£*	*s.*	*d.*

[*Signature*]

[*Date*]

FORM No. 6

Notice by Receiver or Manager on Ceasing to Act

Certificate No.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

NOTICE TO BE GIVEN BY A RECEIVER OR MANAGER ON CEASING TO ACT AS SUCH

Pursuant to s. 95 *of the Companies (Consolidation) Act,* 1908

Name of Company LIMITED.

This Notice must be filed by the Receiver or Manager within twenty-one days from his ceasing to act as such. The penalty for default is a fine not exceeding £50.

Presented for filing by

To the Registrar of Companies

I, the undersigned, , of , hereby give you notice that I ceased to act as Receiver or Manager of the Company Limited, on the day of

[*Signature*]

[*Date*]

APPENDIX B

STOCK EXCHANGE REGULATIONS

SPECIAL SETTLEMENTS

THE following documents and particulars should be sent to the Secretary of the Share and Loan Department, when application is made for a Special Settlement—

STOCK OR DEBENTURE STOCK OF NEW COMPANIES

A Specimen of the Scrip or Stock Certificate.

A Copy of the Prospectus, the Statement in lieu of Prospectus as filed with the Registrar of Joint Stock Companies, Circular or Advertisement relating to the issue.

A letter from the Secretary of the Company, stating:

1. The amount allotted:
   (*a*) to the public.
   (*b*) to others.
2. The amount paid in cash per £100 Stock.
3. That the Scrip or Stock has been or is ready to be issued.

OFFICIAL QUOTATIONS

CONDITIONS PRECEDENT TO AN APPLICATION FOR OFFICIAL QUOTATION

1. That the Prospectus—

Shall have been publicly advertised;

Agrees substantially with the Act of Parliament or Articles of Association;

Provides for the issue of not less than one-half of the Authorized Capital and for the payment of 10 per cent. upon the amount subscribed;

If offering *Debentures* or *Debenture Stock* states fully the terms of redemption;

If offering *Debentures* states whether they are to Bearer or Registered;

In cases where a Company has sold an issue of Capital or *Debentures* or *Debenture Stock* which is subsequently offered for public subscription either by the Company

or any subsequent purchaser, states the authority for the issue and all material conditions of sale.

2. That two-thirds of the amount proposed to be issued of any class of Shares or *Securities*, whether such issue be the whole or a part of the authorized amount, shall have been applied for by and unconditionally allotted to the public, Shares or *Securities* granted in lieu of money payments not being considered to form a part of such public allotment.

3. That the Articles of Association, and the *Trust Deed* where such is required, contain the provisions specified hereafter.

4. That the *Certificate* or Bond is in the form approved.

ARTICLES OF ASSOCIATION

Articles of Association should contain the following provisions—

1. That none of the funds of the Company shall be employed in the purchase of, or in loans upon the security of its own Shares;

2. That Directors must hold a share qualification;

3. That the *borrowing powers* of the Board are limited;

4. That the non-forfeiture of dividends is secured;

5. That the common form of transfer shall be used;

6. That all Share and Stock Certificates shall be issued under the Common Seal of the Company, and shall bear the autographic signatures of one or more Directors and the Secretary;

7. That fully-paid Shares shall be free from all lien;

8. That the interest of a Director in any contract shall be disclosed before execution, and that such Director shall not vote in respect thereof;

9. That the Directors shall have power at any time and from time to time to appoint any other qualified person as a Director either to fill a casual vacancy or as an addition to the Board, but so that the total number of Directors shall not at any time exceed the maximum number fixed; but that any Director so appointed shall hold office only until the next following Ordinary General Meeting of the Company, and shall then be eligible for re-election;

10. That a printed copy of the Report, accompanied by the Balance Sheet and Statement of Accounts shall, at least seven days previous to the General Meeting, be delivered or sent by post to the registered address of every member, and that two copies of each of these documents shall at the same time be forwarded to the Secretary of the Share and Loan Department, The Stock Exchange, London;

11. That the charge for a new Share Certificate issued to replace one that has been worn out, lost, or destroyed shall not exceed one shilling.

TRUST DEEDS

Trust Deeds should contain the following provisions—

1. Where provision is made that the security shall be repayable at a premium, either at a fixed date or at any time upon notice having been given, the *Trust Deed* must further provide that should the Company go into voluntary liquidation for the purpose of amalgamation or reconstruction the security shall not be repayable at a lower price.

2. The following clause should be inserted in all Deeds—

"The statutory power of appointing new Trustees hereof shall be vested in the Company, but a Trustee so appointed must in the first place be approved of by a Resolution of the *Debenture* (or *Debenture Stock*) *holders* passed in the manner specified in the Schedule hereto. A Corporation or Company may be appointed a Trustee of these presents."

3. In the clause regulating the convening of meetings of the *Debenture* (or *Debenture Stock*) *holders*, the following words should be inserted, "and the Trustee or Trustees shall do so upon a requisition in writing signed by holders of at least one-tenth of the nominal amount of *Debentures* (or *Debenture Stock*) for the time being outstanding."

4. The clause defining an "Extraordinary Resolution" must provide that "the expression 'Extraordinary Resolution' means a resolution passed at a meeting of the *Debenture* (or *Debenture Stock*) *holders* duly convened and held at which a clear majority in value of the whole of the *Debenture* (or *Debenture Stock*) *holders* is present in person or by proxy and carried by a majority consisting of not less than three-fourths of the persons voting thereat upon a show of hands, and if a poll is demanded then by a majority consisting of not less than three-fourths in value of the votes given on such poll."

5. Should *Debentures* or *Debenture Stock* be entitled "First Mortgage," provision must be made for the creation of a specific first mortgage in favour of the *Debenture* (or *Debenture Stock*) *holders*.

SHARE AND STOCK CERTIFICATES

All Certificates should state on their face the authority under which the Company is constituted and the amount of the authorized Capital of the Company.

All Certificates should bear a footnote to the effect that no Transfer of any portion of the holding can be registered without the production of the Certificate.

Where the Capital of a Company consists of more than one class of Shares of the same denomination, the distinctive numbers of the Shares of each class must be printed on the face of the Share Certificates.

All Preference Share Certificates should bear on their face a statement of the Company's Capital and the conditions, both as to capital and dividends, under which the Shares are issued.

Debentures and *Debenture Stock* Certificates should, in addition to legal requirements, state on their face the authority under which the Company is constituted, the nominal Capital of the Company, the dates when the interest on the *Debentures* or *Debenture Stock* is payable, and the authority under which the issue is made (*i.e.*, Articles of Association and resolutions); and on their back the conditions of issue, redemption, and transfer.

BONDS

Bonds must specify the amount and conditions of the loan, the powers under which it has been contracted and the numbers and denominations of the Bonds issued.

Bonds and *Debentures* of English Companies must be under the Common Seal of the Company and must bear the requisite autographic signatures.

When an issue of Colonial or Foreign Bonds or *Debentures* is made wholly or partly in London, those issued in London must bear the autographic counter-signature of the London Agents or Contractors.

NEW COMPANIES

Before the application form can be issued for signature there must be supplied—

A Copy of the Prospectus.

Two Copies of the Articles of Association.

In the case of *Debentures* or *Debenture Stock* the *Trust Deed* [where possible before execution].

After the application form has been signed there must be supplied in the case of—

DEBENTURES AND DEBENTURE STOCK

The Certificate of Incorporation, or Act of Parliament, and the Certificate that the Company is entitled to commence business.

A Certified printed copy of the *Mortgage Deed* or other

similar document, and the Official Certificate of the Registration of the *Mortgage* or *Charge*.

Certified copies of the Articles of Association, Resolutions, or other authority for the present issue.

Two Certified copies of the Prospectus.

The original Letters of Application.

The Allotment Book containing a list of applicants, the amount applied for by each, and the result of each application, with a summary of the whole, signed by the Chairman and Secretary.

Should the allotment have taken place at an interval of six months or more before the date of the application, a Certified List of present Stockholders will also be required.

A copy of the Allotment Letter, and the date when posted.

A Specimen of the *Debentures* or *Debenture Stock Certificate* and of the Scrip where Scrip is issued; *Certificates of Debenture Stock* allotted to vendors in lieu of money payments being enfaced "Issued to Vendors."

A copy of the last published Report and Accounts.

The Bankers' Pass Book, accompanied by a Certificate, on a special form, from the Company's Bankers, stating the amount of Deposits received by them and the amount of *Debentures* or *Debenture Stock* on which such Deposits (*i.e.*, application money only, being £ per *Debenture*) were paid.

A Statutory Declaration by the Chairman and Secretary stating—

1. That the Prospectus complies with the provisions of the Companies (Consolidation) Act, 1908, and that all documents required by that Act have been duly filed with the Registrar of Joint Stock Companies and the dates of filing.
2. In the case of an English Company charging property abroad, that the necessary Mortgage has been properly legalized in the country where the property is situated.
3. The amount of Stock applied for by the public.
4. The amount unconditionally allotted to the public (Nos. to).
5. The amount, viz.: £ , paid thereon in cash.
6. The amount allotted for a consideration other than cash (Nos. to).
7. The total amount of Deposits, and that such deposits are absolutely free from any lien.
8. The total number of Allottees.
9. The largest amount of *Debentures* or *Debenture Stock* (*a*) applied for by, and (*b*) allotted to any one applicant.

10. That the *Debentures* or *Debenture Stock Certificates* have been or are ready to be issued.

11. That a *Trust Deed* has been executed and completed if such be the case.

12. The effect of such *Trust Deed*, and the nature of the charge created thereby in favour of the *Debenture holders*.

13. That no impediment exists to the settlement of the Account.

A Statutory Declaration by the Chairman and Secretary, stating—

1. The total amount of the Authorized Capital of the Company and how constituted.

2. The number of Shares allotted unconditionally to the public (Nos. to), and the amount paid on each Share in cash.

3. The number of Shares taken by Concessionnaires, Owners of Property, Contractors or other parties not included in the public allotment (being Nos. to).

4. That the Share Certificates have been or are ready to be issued.

5. That the purchase of the property has been completed and the purchase money paid.

APPENDIX C

STAMP DUTIES AND FEES

1. On Registration of any document required to be registered with the Registrar of Companies, other than the Memorandum of Association, or Particulars of Mortgages or Charges, or Receiver's or Manager's Abstract of Receipts and Payments — 5s. Impressed

Receiver's or Manager's Abstract of Receipts and Payments (see Form No. 5, p. 125) . — No registration fee payable

2. On Registration of Mortgages and Charges—

Where the amount of the mortgage or charge, or the total amount of the whole series does not exceed £200 . . . . . 10s. Impressed

Where the amount of the mortgage or charge, or the total amount of the whole series exceeds £200 . . . . £1 ,,

3. On Transfers on Sale of registered Bonds or Debentures—

CONSIDERATION	DUTY £	s.	d.	
Not exceeding £5		1	–	Impressed
Exceeding £5 and not exceeding £10 .		2	–	,,
,, £10 ,, ,, £15 .		3	–	,,
,, £15 ,, ,, £20 .		4	–	,,
,, £20 ,, ,, £25 .		5	–	,,
,, £25 ,, ,, £50 .		10	–	,,
,, £50 ,, ,, £75 .		15	–	,,
,, £75 ,, ,, £100 .	1	–	–	,,
,, £100 ,, ,, £125 .	1	5	–	,,
,, £125 ,, ,, £150 .	1	10	–	,,
,, £150 ,, ,, £175 .	1	15	–	,,
,, £175 ,, ,, £200 .	2	–	–	,,
,, £200 ,, ,, £225 .	2	5	–	,,
,, £225 ,, ,, £250 .	2	10	–	,,
,, £250 ,, ,, £275 .	2	15	–	,,
,, £275 ,, ,, £300 .	3	–	–	,,
And for every additional £50 or part of £50		10	–	,,
4. On transfers for nominal consideration		10	–	,,

5. On Mortgages, Bonds and Debentures—

AMOUNT SECURED				DUTY s. d.	
Not exceeding £10				3	„
Exceeding £10 and not exceeding £25				8	„
„	£25	„	„ £50	1 3	„
„	£50	„	„ £100	2 6	„
„	£100	„	„ £150	3 9	„
„	£150	„	„ £200	5 0	„
„	£200	„	„ £250	6 3	„
„	£250	„	„ £300	7 6	„
And for every additional £100 or part of £100				2 6	„
If a collateral security, for every £100 or part of £100				6	„

6. Bearer Debentures—

For each £10 or part of £10 secured . . 4 0 „

7. Loan Capital Duty, where not secured by an instrument bearing *ad valorem* duty (*e.g.*, 5 or 6 above)—

2s. 6d. per £100 or part of £100.

8. Scrip Certificate . . . . . . 2*d*. Impressed

9. Letter of Allotment, if amount allotted is less than £5 . . . . 1*d*. „

Letter of Allotment, if amount allotted is £5 or more . . . . 6*d*. „

Letter of Renunciation, if amount renounced is less than £5 . 1*d*. Impressed or adhesive

Letter of Renunciation, if amount renounced is £5 or more . 6*d*.

APPENDIX D

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881

44 & 45 Vict. c. 41, ss. 19–24

Powers Incident to Estate or Interest of Mortgagee.

19.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i) A power, when the mortgage money has become due, to sell or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

(iv) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2) The provisions of this Act relating to the foregoing powers comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4) This section applies only where the mortgage deed is executed after the commencement of this Act.

Regulations of Exercise of Power of Sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Conveyance, Receipt, etc., on Sale.

21.—(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given,

or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(4) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagees' Receipts, Discharges, etc.

22.—(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2) Money received by a mortgagee under his mortgage, or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting

money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Amount and Application of Insurance Money.

23.—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i) Where there is a declaration in the mortgage deed that no insurance is required:

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Appointment, Powers, Remuneration, and Duties of Receiver.

24.—(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed from time to time by the mortgagee by writing under his hand.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8) The receiver shall apply all money received by him as follows (namely):

(i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv) In payment of the interest accruing due in respect of any principal money due under the mortgage:

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

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